85-1483

No._____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1985

BOLESLAVS MAIKOVSKIS,

Petitioner,

-against-

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Questions Presented

1. Does the materiality test in *Chaunt v. United States*, 364 U.S. 350 (1960), apply to false statements in visa applications?

2. If applicable, is the second branch of the *Chaunt* test to be construed as requiring any particular level or degree of probability?

3. Does Section 241(a)(19) of the Immigration and Nationality Act require proof that individuals were persecuted solely because of their political opinions or may political opinions be merely a major or principal factor?

4. Does Section 241(a)(19) of the Immigration and Nationality Act require proof that the alien's own personal motivations and intentions encompass one of the prohibited purposes or is governmental motivation and intent sufficient?

5. Has Petitioner been denied due process of law because the Board of Immigration Appeals, without giving Petitioner any notice, found him deportable under Charge 6, even though before the Immigration Judge the government disclaimed any reliance on the Audrini episode in support of Charge 6 and never pursued that ground before the Board of Immigration Appeals?

List of Parties

Apart from the party named in the caption of this Petition, no other parties were involved in this matter.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Opinions Below

The decision of the Immigration Judge is not officially reported and is set forth in Appendix D, pp. 90a-111a.

The decision of the Board of Immigration Appeals is not officially reported and is set forth in Appendix C, pp. 37a-89a.

The decision of the Court of Appeals is officially reported at 773 F.2d 435 (2nd Cir. 1985), and is set forth in Appendix A, pp. 1a-35a.

The decision of the Court of Appeals denying reargument or rehearing *en banc* is set forth in Appendix B, p. 36a.

Jurisdiction

The judgment of the Court of Appeals was entered on September 17, 1985. A timely petition for reargument, with a suggestion for rehearing *en banc*, was denied on November 12, 1985. By order dated January 16, 1986 (per Marshall, *J.*), Petitioner's time to file a petition for a writ of certiorari was extended to and including March 10, 1986.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Constitutional Provisions and Statutes Involved

1. The Fifth Amendment to the Constitution of the United States.

2. Section 241(a)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1251(a)(1).

3. Section 241(a)(19) of the Immigration and Nationality Act, 8 U.S.C. § 1251(a)(19).

4. Section 242(b) of the Immigration and Nationality Act, 8 U.S.C. § 1252(b).

Statement of the Case

1. Petitioner is an alien who was born in Latvia on January 21, 1904. He entered the United States on December 22, 1951 under the Displaced Persons Act. He remains a citizen of the Republic of Latvia, which is presently under Soviet occupation.

2. In October of 1965, a man named Boleslavs Maikovskis, presumably the Petitioner, was tried *in absentia* and convicted by the Supreme Court of the Latvian Soviet Socialist Republic. The sentence was "death penalty by shooting."

3. The Immigration and Naturalization Service commenced a deportation proceeding against Petitioner by service of the order to show cause dated October 13,

1976, pursuant to Section 242 of the Immigration and Nationality Act, 8 U.S.C. § 1252, charging that Petitioner was ineligible for a visa under the Displaced Persons Act, but had nevertheless obtained a visa by fraud.

4. On October 30, 1978, Pub. L. 95-549, 92 Stat. 2065, Section 241(a) of the Immigration and Nationality Act was amended by adding subdivision (19), which rendered deportable aliens who persecuted people under the direction of the Nazi Government of Germany. Appendix I, p. 232a.

5. On March 18, 1980, an additional charge of deportability, was lodged against the Petitioner under Section 241(a)(19) of the Immigration and Nationality Act, 8 U.S.C. § 1251(a)(19). Appendix F, p. 115a.

6. The charges against Petitioner arose from his service as Chief of Police for the Second Precinct of the Rezekne District Police in Latvia during the German occupation. In December of 1941, a Latvian police patrol was fired upon in the Audrini village, which was within the Second Police Precinct. One or more policemen were killed. Soviet guerrillas, or "partisans" as they were then called, took credit for this incident. They apparently slipped away before the village was surrounded upon orders from the German Security Police Chief, Strauch, who also ordered the arrest of all the villagers and burning of the village. Policemen serving under Petitioner in the Second Precinct were obliged to participate in carrying out Strauch's orders to arrest the villagers and burn the village. The Immigration Judge and the Board of Immigration Appeals found that Petitioner participated in the arrest of all the inhabitants of Audrini, and that he subsequently ordered that the village be burned, but neither the Immigration Judge nor the Board of Immigration Appeals sustained the allegations that Petitioner had been involved in persecution and murder of civilians, especially Jews, at Ancupani Hills and other locations in Latvia.

7. On April 28, 1983, the last session of the deportation hearing was held before the Immigration Judge for the purpose of clarifying and consolidating the charges and allegations that had been lodged against the Petitioner. Separate lists of allegations and charges resulted from this session and were then used by the Immigration Judge, Board of Immigration Appeals and Court of Appeals. Government Exhibit 133, Appendix E, pp. 112a-113a; Government Exhibit 134, Appendix F, pp. 114a-116a.

8. By decision dated June 30, 1983, the Immigration Judge terminated the proceeding, having found that none of the consolidated charges had been sustained. Appendix D, pp. 90a-111a.

9. The Office of Special Investigations (OSI) in the Criminal Division of the Department of Justice, which had taken over prosecution of this proceeding from the Immigration and Naturalization Service, appealed to the Board of Immigration Appeals, which reversed the Immigration Judge's decision and by order dated August 14, 1984, sustained charges 1, 2, 4 and 6, and ordered Petitioner deported. It did not rule on charges 3, 5 and 7. Appendix C, pp. 37a-89a.

10. Petitioner appealed to the Court of Appeals, which affirmed the Board of Immigration Appeals decision.

Reasons for Granting the Writ

I

This Court Should Grant Certiorari to Decide the Unresolved Question of What Materiality Test Should Be Applied to Misrepresentations Made During the Visa Procurement Process.

In *Chaunt v. United States*, 364 U.S. 350 (1960), it was held that the government must "show by 'clear, unequivocal, and convincing' evidence either (1) that

facts were suppressed which, if known, would have warranted denial of citizenship or (2) that their disclosure might have been useful in an investigation possibly leading to the discovery of other facts warranting denial of citizenship," 364 U.S. at 355. *Chaunt,* however, was a denaturalization case involving citizenship petition papers while this is a deportation proceeding involving only the visa application papers.

In *Fedorenko v. United States,* 449 U.S. 490 (1981), at page 509, this Court said:

> [W]e find it unnecessary to resolve the question of whether *Chaunt*'s materiality test also governs false statements in visa applications.

This case presents the question left unresolved in *Fedorenko.*

In this deportation proceeding against Petitioner, the Board of Immigration Appeals did not apply the *Chaunt* test; instead, it articulated its own test thusly:

> In *Matter of S-& B-C-,* 9 I&N Dec. 436 (A.G. 1961), the Attorney General held that a misrepresentation is material if either '(1) the alien is excludable on the true facts, or (2) the misrepresentation tends to shut off a line of inquiry which is relevant to the alien's eligibility and which might well have resulted in a proper determination that he be excluded'. In a more recent decision, *Matter of Bosuego,* 17 I&N Dec. 125 (BIA 1979, 1980), this Board refined *Matter of S-& B-C-, supra.* We held that where it is not shown that an alien would have been excludable on the true facts, then the Government must 'show facts possibly justifying denial of a visa or admission to the United States would have likely been uncovered and considered but for the misrepresentation'. If the Government is able to make this showing, then the burden of proof shifts to the alien to establish that "no proper determination of inadmissibility could have been made." Appendix C, p. 71a.

The court below neither approved the Board of Immigration Appeals test nor applied the *Chaunt* test, but rather formulated yet another and different standard:

> We conclude that once it has been shown that the alien made misrepresentations in his visa application, the materiality of the misrepresentations is established where the government shows that disclosure of the concealed information probably would have led to the discovery of facts warranting denial of a visa. Appendix A, p. 13a.

The several Circuits, including the court below, that have considered this question, have concluded that some variation of a "materiality" test is applicable at the visa stage, but have not articulated a consistent rationale for applying it. *United States v. Sheshtawy*, 714 F.2d 1038 (10th Cir. 1983); *United States v. Koziy*, 540 F.Supp. 25 (S.D.Fla. 1982), *aff'd*, 728 F.2d 1314 (11th Cir.), *cert. denied*, ____ U.S. ____, 105 S.Ct. 130, 83 L.Ed.2d 70 (1984); *United States v. Fedorenko*, 597 F.2d 946 (5th Cir. 1979), *aff'd on other grounds*, 449 U.S. 490 (1981); *La Madrid-Peraza v. INS*, 292 F.2d 1297 (9th Cir. 1974); *Kassab v. INS*, 364 F.2d 806 (6th Cir. 1966); *United States v. Riela*, 337 F.2d 986 (3rd Cir. 1964); *Langhammer v. Hamilton*, 295 F.2d 642 (1st Cir. 1961).

Where the government seeks denaturalization it may seek to establish material misrepresentations in documents *other than* the visa; where, however, as here, it seeks *deportation* of one who never became a citizen the only document it can look to is the *visa application.* Because the consequences to both the alien and this country from issuance of a visa are different from the consequences flowing from the granting of citizenship, the factors that are operable in the decision to issue a visa differ from those in the decision to grant citizenship. Based on these differences, it has been asserted that a different standard of materiality ought to apply where deportation of non-naturalized aliens is involved. See, e.g., NOTE, *Denaturalization of Nazi War Criminals*

After Fedorenko, 15 N.Y.U.J. Inter. L. & Pol. 169, 171, 176-94 (1982); NOTE, *United States v. Fedorenko: The Decision and Its Implications on Nazi War Criminals in the United States,* 20 Col. J. Trans. L. 365, 379 (1981); NOTE, *Immigration and Nationality - Denaturalization of War Criminals - Standard of Materiality for Misrepresentations in Visa Applications,* 56 Tulane L. Rev. 773, 783-4 (1982).

An issue of such importance that this Court saw fit to raise it in *Fedorenko,* despite the fact that all of the parties and lower courts had assumed that it was settled (449 U.S. at 508-09), should not be disposed of on the basis of the unconsidered assumptions of other parties and courts. This is particularly so because this issue is going to recur as the more than 300 investigations and prosecutions being pursued by the government, make their way through the courts. See National Law Journal, Nov. 25, 1985, p. 9, Col. 1.

Accordingly, this Court should grant certiorari to decide the unresolved question of what standard of materiality applies to misrepresentations made during the visa procurement process.

II

Regardless of the Materiality Test Adopted, Certiorari Should Also Be Granted to Resolve the Conflict Among the Circuits Concerning the Parameters of the Test.

The Circuits that have grappled with the meaning of the second branch of the *Chaunt* test have reached conflicting conclusions. As matters now stand, naturalized citizenship and permanent residence status is less vulnerable to attack in the Third and Ninth Circuits than it is in the Second Circuit and perhaps other circuits. Compare *United States v. Kowalchuk,* 773 F.2d 448 (3rd Cir. 1985) (en banc) and *Laipenieks v. INS,* 750 F.2d 1427 (9th Cir. 1985), with the decision in the court below in this proceeding and the cases cited in Point I,

supra. In the former the "would" interpretation prevails, while in the latter the "might" view devalues and depreciates the cherished status of naturalized citizenship or resident alien status. Justice Blackmun's fears that the "might" test would dilute the protection established by prior case law (*Fedorenko v. United States, supra*, 449 U.S. 518, 523-6) were echoed in *United States v. Sheshtawy*, 714 F.2d 1038 (10th Cir. 1983).

In view of this confusion, at least one District Court has applied all available tests to reach a determination. *United States v. Kungys*, 571 F.Supp. 1104 (D.N.J. 1983), *appeal pending*, No. 83-5884 (3rd Cir. Dec. 7, 1983).

The outcome of a deportation proceeding ought not depend on the Circuit where an alien resides. Such a situation verges on a denial of equal protection of the laws. The deportation statutes should be uniformly applied and invidious discrimination ought not be practiced.

The meaning of whatever materiality test is adopted is a rather important issue in the orderly and fair administration of our immigration statutes. As the cases show, visa fraud is an old and recurring problem. It affects not only the so-called "Nazi war criminals" now being hunted by the OSI, but also countless routine visitors, permanent resident aliens and naturalized citizens whose visa applications could come under scrutiny.

Whatever test is adopted, it is submitted that it should be read as requiring proof, by clear, unequivocal and convincing evidence, that had the undisclosed facts been known, an investigation would have been conducted and disqualifying facts would have been discovered.

III

This Court Should Grant Certiorari to Resolve the Conflict Among the Circuits Regarding the Issue of Whether the Alien's Personal Motivations and Intentions Should Be Relevant in Deciding Whether He Has Participated in Proscribed Persecution.

Petitioner contended that neither his role, nor the role of the police department of which he was a member, was motivated by the political opinions of the Audrini villagers. Neither the Immigration Judge nor the Board of Immigration Appeals found the contrary. The Board of Immigration Appeals merely held, and the court below agreed, that:

> We conclude (1) that under the proper interpretation of subsection (a)(19), INS was not required to prove Maikovskis's own personal motivation so long as it proved, by clear, unequivocal, and convincing evidence that the persecution of the Audrini villagers, in which Maikovskis participated, was undertaken 'because of' their political opinion; and (2) that under the proper standard of review, the Board's finding that the persecution was undertaken 'because of' the villagers' political opinions must be upheld. Appendix A, p. 19a.

The Court of Appeals for the Ninth Circuit in *Laipenieks v. INS*, 750 F.2d 1427, 1435 (1985), adopted a contrary legal standard and focused upon the specific acts of the individual alien:

> We find the BIA's analysis and conclusion faulty in several respects. First, we note that the BIA's conclusion that the '[Latvian Political Police] assisted and participated in the persecution' of individuals misstates the requirements for deportability. In order to establish deportability under Section 1251(a)(19), the individual must be found to have participated or assisted the organization in persecutorial acts. Thus, the expert testimony

> as to the acts of the [Latvian Political Police] is only helpful to the extent it establishes that the organization may have been involved in acts of persecution because of political beliefs. The government must also prove by clear, convincing and unequivocal evidence that Laipenieks persecuted individuals because of political opinion or at least that Laipenieks' acts led to the persecution of individuals because of political belief.

The foregoing demonstrates a clear conflict between the Circuits on the critical issue of institutional versus individual motivation under Section 241(a)(19).

The Petitioner proposes to argue that, boiled down to its essence, the Second Circuit's view is this: "If you worked for an organization which had among its activities or missions helping the Nazis in combating its enemies, you are deportable under Section 241(a)(19) of the Immigration and Nationality Act, because the Nazis had among their many enemies Jews who were persecuted because of religion and communists who were persecuted because of political opinion. As long as the objective effect of what you did as an individual was useful to the Nazis in their program of persecution, we will not examine your own motives and intent because you will be deemed to have adopted the motives and intent of the Nazis who benefitted from your actions."

Similarly, the Second Circuit's approach lightens the government's burden of proof to the point where the government has hardly any burden at all. The alien no longer has any connection with the "because of" element, since that has been supplanted by the institutional guilt of either the organization in which he served or the Nazi regime in general. The higher up the hierarchical ladder that the analysis is made the easier it is for the government to prove its case. The courts can take judicial notice of the indisputable fact that the Nazi regime in general persecuted people "because of" not only political opinion but also race or religion. When the necessity for

focusing upon the motive and intent of the accused alien is thusly removed, attention can be turned to the activities of the organization of which he was a part and those activities, even if the alien himself did not engage in them, can be shown as assisting the Nazis in carrying out their despicable programs. What the court below has done is remove the necessity for tying the alien to the "because of" element in Section 241(a)(19) of the Immigration and Nationality Act.

The conclusion that Section 241(a)(19) was never intended to be applied to those who lacked the proscribed motivation and intent is further supported by the following statement by Congressman Eilberg, a proponent of the bill:

> [T]he unbelievable terror, destruction, and wholesale murder that took place at the hands of the Nazis should never be forgotten. Rather, that dreadful period in the history of mankind should forever serve as a tragic reminder to all civilized people of the terrible extremes to which an entire nation can be led by *a small, but highly organized group of demented and ruthless leaders.* This bill addresses itself to the members of *that group* - to the perpetrators of the "Holocaust." [124 Cong. Rec. 31,647 (1978); emphasis added.]

In *Artukovic v. INS*, 693 F.2d 894, 896 (9th Cir. 1982), the Court summarized the section as authorizing deportation of:

> [M]embers of Nazi governments of Europe *who* had persecuted people because of their race, religion, national origin, or political opinion. (emphasis added)

Had assistance of a government which engaged in political persecution alone been deemed sufficient to warrant deportation under Section 241(a)(19), the Court would have said: "members of Nazi governments of Europe *which* persecuted people because of their . . .

political opinion . . . ." The use of the word "who" instead of "which" indicates that it is the motivation of the alien that is critical.

The foregoing demonstrates that individual, not governmental or organizational, motivation is the critical issue under Section 241(a)(19). If the individual and governmental motivations were the same, this would be an academic matter. But that is not the case in this proceeding, for the record clearly indicates that Petitioner had a motivation and intent for his acts that was not only different from that of the Nazis, but was also completely legitimate.

The evidence consists of GX24-10, RX91, RX114, TR699-702, TR419-424. The Germans had a vital military interest in preventing guerrilla attacks on major transport arteries such as railroads; especially the main Berlin to Leningrad line (TR423). Guerrilla activity is made more difficult without support from the local people in the countryside. The Germans chose terror as the means of isolating guerrillas from the local villagers. They took great pains to spread the message that the fate of Audrini awaits all who support terrorists. In GX24-10 it was reported:

> This retaliatory measure was made public in the daily papers published in the territory of Latvia in a notice by the commander of the Security Police and Security Service, and by posting 6000 notices with the same text in all the villages of Lettgallen.

The 6,000 notices were posted in the German, Latvian and Russian languages as follows:

> *The Chief of the German Security Police in Latvia herewith lets to be known:*
>
> 1. There has been repeated edict, that all citizens taking part in any activity hostile to the state, will be severely punished and an especially

hard punishment will be inflicted upon these citizens, who shelter undesirable elements in their apartments and houses, supply them with food and arms, and by doing so are breaking the law.

Lately there have been several incidents, proving to me, that the above edict of the German government has been disregarded.

2. In the Rezekne district, the inhabitants of Audrini village for more than a quarter of a year have been harboring members of the Red Army, supplying them with food and arms, and helping them in any way in their actions

Members of Latvian police were sent to fight these elements.

3. This is the punishment. I ordered as a warning:

a. To burn down the Audrini village;
b. To arrest the villagers and;
c. Publicly execute 30 male inhabitants of the Audrini village in the market place of Rezekne. 1.4.1942.

4. Henceforth every person, disregarding the edict, and helping these elements in any way, will be most severely punished.

Chief of the German Security police in Latvia,
Strauch (Signature),
SS Obersturmbannfuhrer

If, as the Court below opined, "the Nazis sought to rid the Rezekne area of Communists" (Appendix A, p. 26a) publicity and notoriety surrounding Audrini was completely contrary to their policy of discreetly and quietly liquidating people.

Judge Newman recognized the existence of this very evidence when he said:

> The whole point of wartime reprisal, offensive as it may be, is to inflict suffering and even death on innocent persons to deter others from future hostile acts out of concern for the plight of innocent victims.
>
> A reasoned explanation could readily be supplied if the evidence showed that in some villages in Nazi-occupied territories retribution for harboring partisans who had shot local collaboraters was normally confined to guilty individuals, with mass reprisal action, such as that taken in Audrini, occurring only in communities with significant political sympathy for Communists or others opposed to the occupying regime. But we have no reason to believe that the BIA views the evidence in this light, and it is far from clear that such a conclusion would be warranted on this record. Appendix A, p. 30a.

As noted in *Schneiderman v. United States*, 320 U.S. 118 (1942):

> [W]here two interpretations of an organization's program are possible, . . . a court . . . is not justified in . . . imputing the reprehensible interpretation to a member of the organization in the absence of overt acts indicating that such was his interpretation. So uncertain a chain of proof does not add up to . . . "clear, unequivocal, and convincing evidence . . . . Id. at 158-59."

Moreover, when the *Laipenieks* and *Maikovskis* disparate decisions in the Circuits are compared, the conflict which surfaces is a clear denial of equal protection of laws by its unequal application of Section 241(a)(19) to persons similarly situated. As the Supreme Court noted in *Yick Wo v. Hopkins*, 118 U.S. 356 (1886):

> Our Constitution and our civil rights acts have guaranteed to aliens equal protection of the law (which) is a pledge of equal laws.

This Court also pointed out in 1894 in *Duncan v. Missouri*, 152 U.S. 377 (1894), a fundamental principle involved in classification requires that the law affect all persons in the same class under similar circumstances alike.

IV

This Court Should Grant Certiorari to Resolve the Conflict Among the Circuits Regarding the Issue of Single Versus Multiple Motivations for Persecution.

Section 241(a)(19) of the Immigration and Nationality Act proscribes ". . . persecution of any person because of . . . political opinion," but does not provide any guidance for resolving situations where the conduct alleged to constitute persecution is triggered or motivated only in part by political opinion.

The Court of Appeals for the Ninth Circuit addressed this question in *Laipenieks v. INS*, 750 F.2d 1427 (9th Cir. 1985):

> Laipenieks and the [Latvian Political Police] had a legitimate basis for investigating Communists. The Communists remaining in Latvia were sympathetic to a hostile nation who was presently at war with the Latvians and who only a few months earlier had exterminated thousands of Latvian citizens. In light of the potentially legitimate basis for investigating "Communists" at the time in question, we believe it incumbent on the government to establish clearly and convincingly that individuals were persecuted *solely* because of their political opinion. *Id.* at 1436-37. (emphasis added)

The court below came to a different conclusion:

> Even if the Board's decision may be read as finding that the Audrini incident was in part a result of the earlier killing of the two policemen, it is clear that the Board concluded that political opinion was the *principal motivating factor* in the persecution. Since we see no basis in the statute for requiring that the government prove that political opinion was the sole motivation for the persecution, and since we conclude that there was adequate support for the finding that the villagers' political opinions were at least a *major motivation* for the persecution, we reject Maikovskis's contention that the earlier killing of the two Latvian policemen meant that the mass arrests and wholesale arson did not occur 'because of' political opinion. (emphasis added) Appendix A, pp. 25a-26a.

This single versus dual motivation issue is not unique to this deportation proceeding. It was hotly contested in the *Laipenicks* proceeding and no doubt will keep recurring. This Court should consider it and decide what test must be applied in deciding the gravity of the political motivation that should trigger deportation.

V

The Board of Immigration Appeals' *Sua Sponte* Resurrection of the Audrini Episode as Grounds for Deportation Under Charge 6 Denied Petitioner Due Process.

Petitioner was never notified that the Board of Immigration Appeals would consider finding him deportable on Charge 6 based on the Audrini episode.

Before the Immigration Judge, the government relied exclusively on Petitioner's alleged involvement in the Ancupani Hills matter to establish Charge 6 under Section 241(a)(19). At the April 28, 1983 session before the Immigration Judge, the government made it crystal

clear that it was *not* relying on allegations 11, 12 and 13 (relating to the Audrini episode) to prove Charge 6 (Appendix A, p. 16a). This concession by the government was reflected in the Immigration Judge's "Reference Chart" in which he specifically noted that Charge 6 was based solely on allegations 14 through 16 relating to the executions in the Ancupani Hills. Appendix D, p. 111a.

In its brief before the Board of Immigration Appeals, the government completely abandoned *any* reliance on Charge 6 as a basis for deportation. It relied exclusively on the other charges under the Displaced Persons Act as grounds for deportability. See Section III of its brief, entitled "Grounds for Appeal," pages 3 to 5:

> b. Respondent was ineligible to enter the United States under the *Displaced Persons Act* because of his participation in the arrest of all of the Audrini villagers and the wanton burning of the entire village. (Emphasis supplied)

The Petitioner took the government at its word and on page 3 of his brief to the Board of Immigration Appeals, recited the issues raised by the government and stated for the record: "[Petitioner] shall assume that these are the only errors relied upon by the government and shall address them accordingly." The Board of Immigration Appeals ignored the government's position, disregarded the absence of any allegations tying the Audrini incident to Charge 6, and proceeded under its own theory.

The majority in the court below concluded that "we are unable to conclude that Maikovskis lacked notice at any meaningful stage that the Audrini incident would be a basis for deportation under subsection (a)(19), and we see no prejudice to Maikovskis from the INS disclaimer at the 1983 conference." Appendix A, p. 19a.

The dissent of Judge Newman accurately summarizes Petitioner's response thusly:

> Maikovskis is *not* contending that he lacked a fair chance to present evidence [before the Immigration Judge]; his point is that, after prevailing before the Immigration Judge, he lacked a fair chance to persuade the *BIA*, on the government's appeal, that the administrative record does not support a finding by the requisite standard of proof . . . that the Audrini episode was based on political motivation sufficient to satisfy Section 241(a)(19). That opportunity was foreclosed by the Government's action, first, in disclaiming any reliance on the Audrini episode in support of Charge VI, and, second, in pursuing the appeal to the BIA without any mention that the Audrini episode was being reclaimed as a basis for deportation under Section 241(a)(19).
>
> * * * * *
>
> Unless appellate advocacy, whether before judicial or administrative tribunals, is to be deemed worthless, what happened in this case denied Maikovskis a significant opportunity to present his side of the dual motivation issue, a matter, as I have indicated above, that is exceedingly troublesome. This is not simply a case where an agency has relied on a fact adequately supported by the record though not particularly emphasized by the Government during the process of administrative appeal. Here the key issue of political motivation was explicitly taken out of the case by the government's disclaimer before the Immigration Judge and kept out of the case on the appeal to the BIA. (emphasis added) Appendix A, p. 34a.

The essential ingredients of procedural due process are guaranteed to the alien under Section 242(b) of the Immigration and Nationality Act, 8 U.S.C. § 1252(b). Those safeguards include "notice, reasonable under all the circumstances, of the nature of the charges"; and the regulations which embody those procedural requirements are binding upon the Board of Immigration Appeals,

since "the procedure so prescribed shall be the sole and exclusive procedure for determining the deportability of an alien under this section." The Board of Immigration Appeals itself has recognized that "sufficient notice . . . and an opportunity to prepare a defense to deportation is a basic procedural right." *Matter of Samai*, 17 I&N Dec. 242 (Board of Immigration Appeals 1980). The Board of Immigration Appeals is required to make "a scrupulous effort to follow procedures" designed to afford the Petitioner due process. *Attoh v. INS*, 606 F.2d 1273 (D.C.Cir. 1979). Petitioner submits that the Board of Immigration Appeals denied him those procedural safeguards.

It is wholly improper for a party to shift its position on appeal and raise a matter or argument either abandoned or not raised below. See, e.g., *United States v. Knuckles*, 581 F.2d 305, 310 (2nd Cir. 1978). Perhaps of greater importance, it is "manifestly unfair" as well as a deprivation of the "most basic notion of due process" for an appellate court or agency to decide an appeal on a theory not relied on, and, in fact, explicitly abandoned, below. *Dunn v. United States*, 442 U.S. 100, 106-07 (1979); *United States v. San Juan*, 545 F.2d 314, 318-19 (2nd Cir. 1976).

The Board of Immigration Appeals' conclusion that Petitioner is deportable under Charge 6, is devastating. It is tantamount to a death sentence. A finding of deportability under Section 241(a)(19) precludes Petitioner from being eligible for *any* discretionary relief as noted by the Board of Immigration Appeals. Appendix C, pp. 86a-88a.

It is not idle rhetoric to claim that the Board of Immigration Appeals' conclusion is tantamount to a death sentence. A man named Boleslavs Maikovskis, alleged to be the Petitioner in this proceeding, was tried and convicted *in absentia* in October, 1965 by the Supreme Court of the Latvian Soviet Socialist Republic. Boleslavs Maikovskis was sentenced to "death penalty

by shooting.[5] Since the government has stated for the record in other proceedings its desire to deport persons similarly situated to the Petitioner to the Soviet Union (see, e.g., *Linnas v. Immigration & Naturalization Service*, 2nd Cir., No. 85-4163), death by firing squad is what the Petitioner must look forward to if deportability under Charge 6 is sustained.

Conclusion

For the above stated reasons, the petition for a writ of certiorari should be granted and the judgment of the Court of Appeals reversed.

Dated: March 7, 1986

Respectfully submitted,

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85-1493

SUPREME COURT, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
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No._____

IN THE

Supreme Court of the United States

October Term, 1985

BOLESLAVS MAIKOVSKIS,
Petitioner,

-against-

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

APPENDICES TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 674 — August Term, 1984

(Argued: March 4, 1985 Decided: September 17, 1985)

Docket No. 84-4143

BOLESLAVS MAIKOVSKIS,

Petitioner,

—v.—

IMMIGRATION & NATURALIZATION SERVICE,

Respondent.

Before:

MANSFIELD, NEWMAN, and KEARSE, *Circuit Judges.*

Petition for review of a decision of the Board of Immigration Appeals finding petitioner deportable under §§ 241(a)(1) and (19) of the Immigration and Nationality Act, as amended, 8 U.S.C. §§ 1251(a)(1) and (19).

Denied.

Judge Newman concurs in part and dissents in part in a separate opinion.

IVARS BERZINS, Babylon, New York (Joel A. Brenner, Ronald M. Organ, Ivars Berzins, P.C., Babylon, New York, on the brief), *for Petitioner.*

Appendix A
Opinion of United States Court of Appeals

RUDOLPH W. GIULIANI, United States Attorney for the Southern District of New York, New York, New York, (Neal M. Sher, Director, Michael Wolf, Deputy Director, Jeffrey N. Mausner, Trial Attorney, Office of Special Investigations, Criminal Division, Department of Justice, Thomas E. Moseley, Assistant United States Attorney, on the brief), *for Respondent.*

KEARSE, *Circuit Judge:*

Petitioner Boleslavs Maikovskis petitions this Court pursuant to the Immigration and Nationality Act, as amended ("INA" or the "Act"), 8 U.S.C. § 1101 *et seq.* (1982), to review a unanimous decision of the Board of Immigration Appeals ("BIA" or the "Board") finding nim deportable under § 241(a)(1) of the Act, 8 U.S.C. § 1251(a)(1), for having procured his immigration visa by means of willful misrepresentation of material facts, and under § 241(a)(19) of the Act, 8 U.S.C. § 1251(a)(19), for having assisted the Nazis in political persecution. On this petition, Maikovskis challenges the Board's finding of deportability under § 241(a)(1) on the ground that the Board incorrectly found his false statements to be material; he challenges the § 241(a)(19) finding of deportability on the grounds that he had inadequate notice that the Immigration and Naturalization Service ("INS") would rely on a certain series of events as a basis for the § 241(a)(19) charge and that, in any event, that charge was not proven. We reject these challenges and uphold the determinations of deportability under both sections.

Appendix A
Opinion of United States Court of Appeals

I. BACKGROUND

Maikovskis, a native of Latvia, entered the United States in 1951 on an immigrant visa issued under the Displaced Persons Act of 1948, Pub. L. No. 80-774, 62 Stat. 1009 (1948), as amended by Pub. L. No. 81-555, 64 Stat. 219 (1950) ("DP Act"). His application for admission pursuant to the DP Act stated that from December 1941 to October 1944 he had worked as a bookkeeper for the Latvian Railway Department in Riga, Latvia.

In 1976, INS instituted deportation proceedings against Maikovskis, initially invoking § 241(a)(1) of the Act, and later invoking § 241(a)(19) of the Act as well. Section 241(a)(1) provides for the deportation of any alien who

> at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry.

8 U.S.C. § 1251(a)(1). The DP Act, at the time of Maikovskis's entry, made excludable any person who "willfully ma[d]e a misrepresentation for the purpose of gaining admission into the United States," § 10, 62 Stat. 1013, or "who advocated or assisted in . . . persecution because of race, religion, or national origin," § 13, 64 Stat. 227. INA § 241(a)(19) provides for the deportation of any alien who

> during the period beginning March 23, 1933, and ending on May 8, 1945, under the direction of, or in association with—
>
> (A) the Nazi government of Germany,
>
> (B) any government in any area occupied by the military forces of the Nazi government of Germany,
>
> (C) any government established with the assistance or cooperation of the Nazi government of Germany, or

> (D) any government which was an ally of the Nazi government of Germany,
>
> ordered, incited, assisted, or otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion.

8 U.S.C. § 1251(a)(19). As discussed in greater detail in Part III.A. below, the deportation proceeding was long and complex. Briefly, the grounds of INS's charges, as initially pleaded and as modified during the course of the hearings, were (1) that Maikovskis was deportable pursuant to § 241(a)(1) because statements in his DP Act application as to his employment during the period 1941-1944 were materially false, since in fact he had not been a bookkeeper for the railroad but had been chief of police in a Nazi-dominated police force in Rezekne, Latvia; and (2) that he was deportable under § 241(a)(19) because, in his position as police chief, he had assisted the Nazis in political persecution. Evidence presented at the deportation hearings before the Immigration Judge ("IJ") painted the following picture, much of which is not here disputed.

A. *The Evidence*

At the time of the Nazi Germany invasion of the Soviet Union, Maikovskis lived in Rezekne. In July 1941, German forces reached Rezekne and established a local Latvian police unit under the command of the SS. Maikovskis volunteered for and obtained the position of Chief of the Second Police Precinct of the Rezekne District for the Nazi-created police force, a full-time job he held from about July 1941 until 1944.

Maikovskis was responsible for an area that included the village of Audrini, which had an ethnic Russian population of the Orthodox faith believed by the Germans to be inclined toward Communism. In December 1941, altercations occurred between Latvian police and Soviet

partisans believed to be harbored in Audrini, and at least two Latvian police officers were killed.

Nazi authorities ordered that action be taken against Audrini, and, on or about December 22, 1941, Maikovskis ordered his Latvian police to join with German soldiers in arresting all of the Audrini villagers, totaling 200-300 men, women, and children; on or about January 2, 1942, pursuant to Maikovskis's orders, his policemen assisted the Germans in burning the village to the ground. INS introduced several authenticated documents relating to these events, one of which was a memorandum, which Maikovskis acknowledged having signed, in which Maikovskis reported to his Latvian supervisor the mass arrests and burning of the village (hereinafter the "Audrini incident"). Maikovskis testified that he had had no choice but to order the mass arrests and burning of the village because the Nazis, through his Latvian superior, had ordered him to do so. Subsequently, in events with which Maikovskis denies involvement, about 30 of the Audrini villagers were publicly shot in the Rezekne market square, and the remaining villagers were transported to the nearby Anchupani Hills where they too were shot.

In order to show the materiality of Maikovskis's visa application misrepresentations, INS presented the testimony of the official who, as State Department vice consul in 1951, had issued Maikovskis's visa under the DP Act. She testified that if Maikovskis's application had revealed his police activities, Maikovskis would have been *per se* ineligible under the DP Act, and she would have denied him a visa. In an effort to show that his misrepresentations were not material, Maikovskis introduced witnesses who testified that some known members of the Latvian police in fact had not been excluded under the DP Act. These witnesses acknowledged, however, that a visa applicant who was known to have served in the Latvian police force would have had his background fully investigated.

B. *The IJ's Decision*

As discussed in greater detail in Part III.A. below, the numerous charges asserted by the government against Maikovskis were eventually consolidated and numbered I through VII. As thus restated, Charges I through V and VII invoked § 241(a)(1), asserting that Maikovskis was deportable because of his misrepresentations in obtaining his visa (Charges I, II, and IV); because his entry was "prejudicial to the interest of the United States" (Charge III); because he had "advocated or . . . assisted in the persecution of any person because of race, religion, or national origin" (Charge V); and because he had "been a member of or participated in a movement which was hostile to the United States" (Charge VII). Charge VI invoked § 241(a)(19) and asserted that Maikovskis was deportable because he had

> ordered, incited, assisted or otherwise participated in the persecution of persons because of race, religion, national origin, or political opinion, under the direction of, or in association with, the Nazi government of Germany, any government in any area occupied by the military forces of the Nazi government of Germany, any government established with the assistance or cooperation of the Nazi government of Germany, or any government which was an ally of the Nazi government of Germany, during the period beginning on March 23, 1933, and ending on May 8, 1945.

In a decision dated June 30, 1983 ("IJ Decision"), the IJ found, *inter alia*, that Maikovskis had knowingly and intentionally failed to disclose that he had been a policeman in Rezekne during the period 1941 through 1943, and that in that period Maikovskis had participated or acquiesced in the arrest of a number of peaceful civilian inhabitants of Audrini and in the burning of

their dwellings. The IJ nonetheless concluded that Maikovskis was not deportable under any of the seven charges lodged against him.

The IJ declined to find Maikovskis deportable on the basis of the misrepresentations in the visa application documents. He noted that, although Maikovskis had provided "obviously false" information as to his prior employment, that was insufficient to require deportation because "the Government must establish not only a misrepresentation which cut off a relevant line of inquiry, but one which would have led to a proper determination that he was ineligible for a visa. This they have not done." IJ Decision at 17.

With regard to the Audrini incident, the IJ concluded:

> The Government has not established that the respondent was excludable under Sections 2, 10, or 13 [of the DP Act] as one who advocated or assisted in persecution. It has been shown that he participated in the arrest of the Audrini villagers and in the burning of the village under orders of the German invaders of Latvia, as a reprisal against the killing of one or more Latvian policemen. That event ultimately led to the Audrini massacre. There has been no suggestion of racist motivation in that atrocity. On this record, the respondent's complicity has not been shown to have gone beyond the arrests and the burning of the village. The ultimate violation of the laws of war which followed has not been shown to be either predictable, planned or inevitable. Charge V and Charge VI are therefore not sustained.

Id. at 18. The IJ ordered the deportation proceedings terminated.

C. *The BIA's Decision*

The government appealed the IJ's decision to the Board, which, in a decision dated August 14, 1984 ("BIA Decision"), reversed, finding Maikovskis deportable under both § 241(a)(1) and § 241(a)(19).

First, with respect to the § 241(a)(19) charge, the BIA concluded that "even on the facts admitted by [Maikovskis] and found by the immigration judge, the respondent engaged in persecution of civilian populations" in connection with the Audrini incident. BIA decision at 21. The Board found, on the basis of expert testimony and numerous documents submitted at the hearing, that the Rezekne police force operated under the direction of the Nazis. It found, on the basis of Maikovskis's own testimony, that Maikovskis had assisted the Nazis in carrying out the mass arrests and burning of the village. The Board had no difficulty in concluding that the Audrini incident constituted persecution of the villagers. Noting that the legislative history of § 241(a)(19) indicated that Congress viewed "persecution" as including "the deliberate imposition of *severe economic disadvantage* or the *deprivation of* liberty, food, *housing*, employment *or other essentials of life*," BIA Decision at 22 (quoting and emphasizing H.R. Rep. No. 1452, 95th Cong., 2d Sess. 3, *reprinted in* 1978 U.S. Code Cong. & Ad. News 4700, 4704), the Board stated that, even leaving aside the subsequent mass murders of the villagers, "the arrests of every inhabitant closely followed by the burning of their village constituted persecution of the civilian population," BIA Decision at 21.

Finally, the Board found that the persecution had been initiated because Soviet partisans had been found hiding in the village and because some of the villagers were apparently sympathetic to the Soviet cause. It concluded that

> the actions carried out against the Audrini villagers were initiated because of the political opinions held by some of the inhabitants. Under these

> circumstances, we have no difficulty in concluding that the persecution in which the respondent assisted was based on political opinion . . . .

Id. at 24. The Board rejected Maikovskis's contention that the Audrini incident was a nonpolitical response to the earlier killings of two Latvian policemen since there was no evidence of any attempt to ferret out the persons who did the killing, and the mass arrests and burning of the entire village went beyond any so-called necessary military retaliation.

With respect to the § 241(a)(1) charges, the BIA concluded that Maikovskis's concealment of his position as police chief was material and therefore rendered him deportable as asserted in Charges I, II, and IV. The BIA noted that all of the witnesses who testified as to the effect of Maikovskis's misrepresentations

> stated that, at the very least, further inquiry would have been made if the respondent had revealed that he was the police chief of the Second Precinct in Rezekne during World War II. It is fair to assume that further inquiry would have led [to] the discovery of other true facts, including disclosure of the respondent's role in the fate of Audrini, a village within his precinct, and its inhabitants.

BIA Decision at 34.

D. *The Issues on This Petition*

In petitioning this Court to review the Board's decision, Maikovskis challenges the BIA's findings of deportability under both § 241(a)(1) and § 241(a)(19). He contends that in finding deportability under § 241(a)(1) the BIA used an incorrect standard to assess the materiality of the misrepresentations in his visa application and that, in any event, those misrepresentations were not material. As to the § 241(a)(19) charge, he

contends (1) that he was given inadequate notice that the Audrini incident would be relied on as a basis for that charge, and that he was therefore deprived of an opportunity to litigate the issue of whether the Audrini incident was motivated by one of the factors listed in § 241(a)(19), and (2) that the finding of deportability under § 241(a)(19) was erroneous because it was not demonstrated that the Audrini arrests and burning occurred "because of" the villagers' political opinion.

II. DEPORTABILITY UNDER § 241(a)(1)

In challenging the BIA's determination that he was deportable under § 241(a)(1) on the ground that he had obtained his visa through fraud and misrepresentation, Maikovskis argues chiefly that the BIA applied the wrong standard in assessing the materiality of his misrepresentations and that his mispresentations were immaterial under any test. We disagree.

An alien who has made misrepresentations in his visa application documents is deportable on account of those misrepresentations only if they were material. *Fedorenko v. United States*, 449 U.S. 490, 507-08 (1981); *see Chaunt v. United States*, 364 U.S. 350 (1960). In *Chaunt*, a denaturalization case, the Court concluded that, in order to revoke a citizenship decree because of misrepresentations, the government must establish

> either (1) that facts were suppressed which, if known, would have warranted denial of citizenship or (2) that their disclosure might have been useful in an investigation possibly leading to the discovery of other facts warranting denial of citizenship.

Id. at 355. Although the Supreme Court has declined to resolve the issue of whether *Chaunt*'s materiality test for citizenship revocation applies to misrepresentations at the visa stage, *see Fedorenko v. United States*, 449 U.S.

at 509, all of the Courts of Appeals that have considered the issue deem the *Chaunt* test applicable to misrepresentations in visa application documents. *See United States v Fedorenko*, 597 F.2d 946, 951 (5th Cir. 1979), *aff'd on other grounds*, 449 U.S. 490 (1981); *Kassab v. INS*, 364 F.2d 806, 807 (6th Cir. 1966); *United States v. Rossi*, 299 F.2d 650 (9th Cir. 1962); *Langhammer v. Hamilton*, 295 F.2d 642, 648 (1st Cir. 1961); *see also United States v. Palciauskas*, 734 F.2d 625, 628 (11th Cir. 1984).

There is, however, disagreement as to the precise content of the second branch of the *Chaunt* test. Some have interpreted it as imposing on the government virtually the same burden as that imposed by the first branch, *i.e.*, the obligation to show that the undisclosed information "would" have led to the discovery of facts warranting denial of a visa. *See Fedorenko v. United States*, 449 U.S. at 518-26 (Blackumn, *J.*, concurring); *United States v. Sheshtawy*, 714 F.2d 1038, 1040-41 (10th Cir. 1983); IJ Decision at 17. On the other hand, the second prong of *Chaunt* speaks in terms of a disclosure that "*might* have been useful in an investigation *possibly* leading to the discovery of other facts," 364 U.S. at 355 (emphasis added), and others have concluded that the possibility, rather than the certainty, of discovery of disqualifying facts is sufficient to warrant the alien's loss of his fraudulently acquired rights. *See Fedorenko v. United States*, 449 U.S. at 526-29 (White, *J.*, dissenting); *United States v. Koziy*, 728 F.2d 1314, 1320 (11th Cir.), *cert. denied*, 105 S.Ct. 130 (1984); *Kassab v. INS*, 364 F.2d at 807. In *United States v. Oddo*, 314 F.2d 115 (2d Cir.), *cert. denied*, 375 U.S. 833 (1963), this Court, in affirming an order revoking citizenship on the basis of misrepresentation in the naturalization proceeding, stated that "[f]ailure to disclose a record of prior arrests, even though none of those arrests by itself would be sufficient ground for denial of naturalization, closes to the Govern-

ment an avenue of enquiry which *might conceivably* lead to collateral information of greater relevance." *Id.* at 118 (emphasis added).

Maikovskis contends that the Board adopted the latter view of *Chaunt* and applied a possibility test to judge the materiality of his misrepresentations and that this was error. We disagree with this interpretation of the Board's opinion and with the contention that its ultimate conclusion was erroneous. As we read the BIA Decision, the Board concluded that it was not necessary to determine whether the second branch of *Chaunt* imposed a certainty test or a possibility test, because it found that, if Maikovskis had revealed that he was police chief of the Rezekne precinct in which Audrini was located, "[i]t is fair to assume that further inquiry would have led [to] the discovery of other true facts, including disclosure of the respondent's role in the fate of Audrini, a village within his precinct, and its inhabitants." BIA Decision at 34. The Board concluded that "[r]egardless of what standard of materiality is applied, then, the respondent's misrepresentations were material." *Id.*

It appears to us that the Board's standard—premised on its "fair . . . assum[ption]" that investigation "would" have led to discovery of disqualifying facts—falls somewhere between the two interpretations of the second branch of *Chaunt*, and is, in essence, a "fair probability standard." Without reaching the question of whether the government would be entitled to prevail in a deportation proceeding where it has shown only that the undisclosed facts might possibly have led to the discovery of disqualifying facts, we conclude that a reasonable probability standard is more appropriate than the certainty advocated by Maikovskis. In deportation proceedings, the government has the heavy burden of proving the facts on which it relies by "clear, unequivocal, and convincing evidence." *Woodby v. INS*, 385 U.S. 276, 286 (1966). If material facts have successfully been concealed

in the visa application documents, either by nondisclosure or by affirmative misrepresentation, the concealment has deprived the government of the opportunity to make an investigation into the alien's actual circumstances at a time when the truth would have been more easily discoverable. Thus, application of a certainty standard would encourage the alien to conceal material information in his visa application documents and reward him for the initial success of his nondisclosure. We conclude that once it has been shown that the alien made misrepresentations in his visa application, the materiality of the misrepresentations is established where the government shows that disclosure of the concealed information probably would have led to the discovery of facts warranting the denial of a visa.

Under this standard, Maikovskis's misrepresentations, which concealed his police service at the time of his visa application, were plainly material. We agree with the Board that disclosure of Maikovskis's position would probably have led to the discovery of his role in the Audrini incident, which would have led to his exclusion under the DP Act, and we consider this probability sufficient to establish the materiality of the misrepresentations and nondisclosures in his visa application documents. The fact that some known Latvian policemen were allowed to enter the United States is of no moment. The witnesses who described the application process, including Maikovskis's witnesses, acknowledged that an applicant who was known to have served with the Latvian police would have had his background fully investigated to determine whether he had assisted in persecution. This evidence, coupled with the evidence that many former Latvian policemen were denied entry under the DP Act, demonstrates that Maikovskis's misrepresentations cut off a relevant line of inquiry, preventing the immigration authorities from conducting a thorough investigation of his background to determine his eligibility on the basis of complete information.

We conclude that the Board correctly found that Maikovskis made material misrepresentations in his visa application, and we therefore affirm the determination that Maikovskis was deportable under § 241(a)(1).

III. DEPORTABILITY UNDER § 241(a)(19)

Notwithstanding our conclusion that the Board's finding that Maikovskis is deportable under § 241(a)(1) should not be disturbed, we must reach the question of his deportability under § 241(a)(19) also, because the consequences of a finding of deportability under the latter subsection are potentially more onerous for Maikovskis. Whereas an alien found deportable under § 241(a)(1) may petition for and receive a discretionary ruling relieving him of the order of deportation, such relief is not available to an alien found deportable under subsection (a)(19). *See* INA § 241(f), 8 U.S.C. § 1251(f) (waiver of deportation unavailable); INA § 243(h)(2)(A), 8 U.S.C. § 1253(h)(2)(A) (withholding of deportation unavailable); INA § 244(a), 8 U.S.C § 1254(a) (suspension of deportation unavailable).

In challenging the Board's finding of deportability under subsection (a)(19), Maikovskis argues principally that (1) he was not given adequate notice that the Audrini incident was to be used as a basis for urging his deportation under this subsection, and hence he was denied the opportunity to show that the Audrini events in which he participated were not motivated by a purpose listed in subsection (a)(19), and (2) the proof of the Audrini incident did not suffice to warrant a finding that his conduct was motivated by a purpose listed in subsection (a)(19). We disagree with both contentions.

A. *Notice of the Subsection (a)(19) Charge*

The deportation proceeding was instituted in 1976 by order to show cause and notice of hearing. In its

initial petition and in several subsequent amendments, INS asserted some 10 charges of deportability against Maikovskis under § 241(a)(1). There were 30 factual allegations made in support of these charges, including several (originally numbered 23, 24, and 25) relating to the Audrini incident. As eventually recast and renumbered by the IJ (see below), these Audrini-related allegations were as follows:

> 11. You participated or acquiesced in the arrest of a number of peaceful civilian inhabitants of the village of Audrini, Latvia, in or about December, 1941.
>
> 12. You participated or acquiesced in the burning of the dwellings of a number of peaceful civilian inhabitants of the village of Audrini, Latvia, on or about January 2, 1942.
>
> 13. You participated or acquiesced in the execution of a number of peaceful civilian inhabitants of the village of Audrini, Latvia, at the location known as Anchupani Hills, on or about January 3, 1942.

In the original INS order to show cause, no mention was made of subsection (a)(19), for the simple reason that that subsection did not then exist.

In 1978, Congress added subsection (a)(19) to § 241, providing for the deportation of any alien who had, in association with the Nazis, "ordered, incited, assisted, or otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion." *See* Pub. L. No. 95-549, 92 Stat. 2065 (1978). In March 1980, INS modified its order to show cause to add the charge that Maikovskis was deportable under that subsection as well. INS's new charging document indicated that the subsection (a)(19) charge was based on the three new fact allegations there set forth "in addition to those set forth in the order to show cause and notice of hearing."

The evidentiary hearings in the proceedings were held from October 1977 through December 1977, and from July 1981 through March 1982. The lengthy hiatus occurred as the INS took depositions in Latvia and obtained a subpoena and an order compelling Maikovskis to testify in the hearings. Most of the hearings, and all of Maikovskis's testimony, took place after INS had modified its deportation petition to add the subsection (a)(19) charge.

Following the close of the evidence, the parties submitted posthearing briefs to the IJ. Maikovskis's brief argued that the essential elements of the subsection (a)(19) charge had not been proven because the government had failed to prove that the Audrini incident occurred because of the race, religion, or political opinions of the victims.

More than a year after the evidence was closed, and long after the posthearing briefs had been submitted, the IJ summoned the parties for a conference ("April 1983 conference") in an effort to clarify the INS charges and the factual contentions offered in support of them. The IJ consolidated INS's eleven charges into the seven charges described in Part I.B. above; he consolidated INS's 33 fact allegations into 16, three of which have been quoted in the present section; and he questioned the INS attorneys as to which of the factual allegations were offered in support of which of the seven charges. When the IJ reached Charge VI, the subsection (a)(19) charge, the government identified the factual allegations on which it relied, and expressly disclaimed reliance on allegations 11-13:

> THE COURT: And you do not include 11, 12 and 13 . . . right?
>
> MR. MAUSNER: That is correct.

In preparing his decision, issued two months after this conference, the IJ prepared a chart, indicating which allegations the government had stated it offered in

support of which charge. Allegations 11, 12, and 13 were not shown as having been offered in support of the subsection (a)(19) charge.

On the basis of the statements of the government attorneys at the April 1983 conference, and the IJ's chart omitting allegations 11, 12, and 13 as asserted bases for the subsection (a)(19) charge, Maikovskis contends that he was not given adequate notice that the Audrini incidents would be used as a basis for seeking his deportation under subsection (a)(19). He argues that since he was unaware of the nexus between the Audrini incident and the (a)(19) charge, the issue of whether the Audrini incidents occurred "because of" the villagers' political opinion, as found by the BIA, was never adequately explored. Although we believe that, in light of INS's disclaimer that at the April 1983 conference, the IJ and the BIA would have been within the bounds of discretion to disregard the Audrini incidents in considering the (a)(19) charges, we reject Maikovskis's contention that that disclaimer is a basis for overturning the Board's decision that he is deportable under that subsection since we are unable to see that Maikovskis lacked appropriate notice of any meaningful stage or that he was prejudiced in any way by the course of events.

First, we noted that Maikovskis had ample notice early in the proceedings that the Audrini incident would be the basis for some INS charges. The factual allegations were included in an early amendment to INS's order to show cause and notice of hearing; and Charge V asserted that Maikovskis was deportable because he had assisted in the persecutions of persons "because of" race, religion, or national origin. When INS modified its deportation petition in 1980, it stated that the factual allegations already made were invoked in support of the newly added § 241(a)(19) charge. This should have sufficed to alert Maikovskis that INS contended that the Audrini incident occurred "because of" the villagers' race, religion, national origin, or political opinion. And,

indeed, the facts surrounding the Audrini incident appear to have been the subject of considerable testimony at the evidentiary hearings, which concluded in March 1982.

The government disclaimer relied upon by Maikovskis in his petition to this Court did not occur until more than a year after the conclusion of the hearings; thus, Maikovskis could not have relied on it in fashioning the proof he wished to present at the hearings. And certainly he did not rely on it in arguing his case to the IJ, for he fully presented in his posthearing brief to the IJ the very point he now contends that the government disclaimer prevented him from developing at the hearing. That brief contended that the subsection (a)(19) charge had not been proven because the subsection required, *inter alia*, that "[t]he persecution must have been motivated by considerations of race, religion, national origin, or political opinion" (Maikovskis Post Hearing Memorandum at 27), and that "[o]ther motives, no matter how base and despicable, plainly are not within the statutory scheme" (*id.*). Maikovskis argued that the Audrini "massacre was obviously motivated by strategies from the struggle against guerillas, regardless how base those strategies might actually be. It has nothing to do with race or religion." (*Id.* at 27-28). His brief concluded that

> [t]he government's evidence is insufficient to establish that respondent personally participated in persecution of others because of race, religion, national origin or political opinion.

(*Id.* at 28.)

Finally, although the IJ's charge/allegation chart reflected the government's disclaimer as to allegations 11-13, the IJ apparently did consider the Audrini incident in connection with the charge of deportability under subsection (a)(19), Charge VI. Thus, he noted that, as to "the specific allegations numbered 10 through 16," "[p]roof of some or all of those, coupled with number 6

would [possibly] support . . . Charge . . . VI." IJ Decision at 12. And, after finding several allegations including 11 and 12 proven, the IJ stated that the government stated that those "findings would sustain Deportability under Charge . . . VI . . . ." *Id.* at 17. Thus, notwithstanding the chart and the earlier disclaimer, the IJ's opinion reveals that both the IJ and the government continued to view the Audrini incident, as set forth in allegations 11 and 12, to be pertinent to the subsection (a)(19) ground asserted in Charge VI.

In light of the course of the administrative proceedings and the arguments actually advanced by Maikovskis in those proceedings, we are unable to conclude that Maikovskis lacked notice at any meaningful stage that the Audrini incident would be a basis for deportation under subsection (a)(19), and we see no prejudice to Maikovskis from the INS disclaimer at the 1983 conference.

B. *The Merits of the Subsection (a)(19) Decision*

Maikovskis attacks the Board's finding of deportability under § 241(a)(19) on the grounds that the evidence did not support either the conclusion that he personally was motivated by the Audrini villagers' political opinion in ordering his policemen to assist the Nazis in arresting the villagers and burning the village, or the conclusion that the Nazis' order to him was motivated by the villagers' political opinion. We conclude (a) that under the proper interpretation of subsection (a)(19), INS was not required to prove Maikovskis's own personal motivation so long as it proved, by clear, unequivocal, and convincing evidence that the persecution of the Audrini villagers, in which Maikovskis participated, was undertaken "because of" their political opinion; and (2) that under the proper standard of review, the Board's finding that the persecution was undertaken "because of" the villagers' political opinions must be upheld.

Appendix A
Opinion of United States Court of Appeals

1. *The Requirements of Subsection (a)(19)*

Section 241(a)(19), quoted in full in Part I above, provides that an alien is deportable if he or she, "under the direction of, or in association with" the Nazis "ordered, incited, assisted, or otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion." Maikovskis argues that under this provision the government must prove that his own intention was to persecute the Audrini villagers on account of their political opinion. We disagree.

To begin with, the syntax of subsection (a)(19) suggests that the alien's personal motivation is not paramount. The structure of the subsection indicates rather that the Nazis' course of persecution must be shown to have been motivated by one of the listed factors. If, on the other hand, Congress had intended the interpretation of the subsection advanced by Maikovskis, it could simply have relocated the "because of" phrase to the beginning of subsection (a)(19), where it would have referred to the phrase "alien . . . who" earlier in subsection (a). Thus, Congress could have provided for the deportability of an "alien who, because of the victims' political opinion [etc], assisted" in persecution by the Nazis. This is not, however, the way the statute was framed. As we read the actual language of subsection (a)(19), it does not require proof that the alien identified himself with the Nazis' basis for persecution; if the Nazi persecution occurred "because of" political opinion, the alien who assisted or otherwise participated in it is subject to deportation under subsection (a)(19). *Cf. Fedorenko v. United States*, 449 U.S. at 512 (declining to read § 2(a) of the DP Act, which makes ineligible for visas individuals who assisted the enemy in persecuting civilians, as making ineligible only those who voluntarily assisted in such persecution).

This reading of the language of subsection (a)(19) finds support in the legislative history of the subsection. The 1978 amendments to the Immigration and Nationality Act, which included the enactment of § 241(a)(19), were designed, *inter alia*, to establish within the permanent United States immigration laws provision for the exclusion of aliens who have participated in persecution. Such provisions had appeared previously in special refugee measures such as the DP Act. *See* H.R. Rep. No. 1452, 95th Cong., 2d Sess. 3, *reprinted in* 1978 U.S. Code Cong. & Ad. News 4700, 4702 [hereinafter cited as House Report]. As the precise focus of § 241(a)(19), the report of the House of Representatives Committee on the Judiciary stated as follows:

> In making a "persecution" determination, emphasis should be placed on the governmental nature of the conduct involved. Isolated instances of mistreatment on the part of one individual against another, without Government support or complicity, would clearly not meet that criterion.

House Report, *reprinted in* 1978 U.S. Code Cong. & Ad. News 4700, 4706.

In sum, the language, the purpose, and the legislative history of subsection (a)(19) support the conclusion that the government need not prove that the alien's assistance to the Nazis in the course of their persecution because of the victims' political opinion was motivated by the same political animus on the part of the alien.

We do not mean to suggest by this ruling either that an alien's inactive membership in an organization bent on politically-based persecution or that his tangential provision of services to such an organization would suffice to show that the alien assisted or otherwise participated in such persecution within the meaning of subsection (a)(19). As the Court noted in *Fedorenko*,

> an individual who did no more than cut the hair of female inmates before they were executed cannot be found to have assisted in the persecution of civilians. On the other hand, there can be no question that a guard who was issued a uniform and armed with a rifle and a pistol, who was paid a stipend and was regularly allowed to leave the concentration camp to visit a nearby village, and who admitted to shooting at escaping inmates on orders from the commandant of the camp, fits within the statutory language about persons who assisted in the persecution of civilians. Other cases may present more difficult line-drawing problems but we need decide only this case.

449 U.S. at 512-13 n.34. As with the case of the concentration camp guard in *Fedorenko*, there is little difficulty in determining that a police chief who, on orders from the Nazis, ordered his men to arrest all of the inhabitants of a village and burn the village to the ground has assisted in persecution.

2. *The Validity of the Board's Finding*

In reviewing a BIA order of deportation, courts are required to give substantial deference to the Board's findings of fact. *Wong Wing Hang v. INS*, 360 F.2d 715, 717 (2d Cir. 1966). Those "findings of fact, if supported by reasonable, substantial, and probative evidence on the record considered as a whole, shall be conclusive . . . ." 8 U.S.C. § 1105a(a)(4); *see Foti v. INS*, 375 U.S. 217, 222-23 (1964). We conclude that in the present case the record as a whole contains reasonable, substantial, and probative evidence that the mass arrests of the Audrini villagers in December 1941 and the burning of the village a few days later were undertaken "because of" the villagers' political opinions and that Maikovskis assisted in this persecution.

First, there was ample evidence that Maikovskis actually assisted the Nazis in the persecution of the Audrini villagers. Maikovskis testified that, in response to a German directive, he ordered his police to assist the German soldiers in the mass arrest of the Audrini villagers and the burning of the village. Maikovskis's orders were followed, and he thereafter signed and sent a report to his Latvian superior, stating that "on orders of the German authorities, all the residents of Audrini Village, Makaseni County, were imprisoned, but the village itself was burned."

As to the motivation for the persecution of persons because of their political opinion within the meaning of § 241(a)(19), the Board made the following finding:

> The inhabitants of Audrini, who were Latvian, and whose faith was apparently Orthodox (Tr. at 363), were persecuted because Soviet partisans had been found hiding in the village. *As a result of the fact that some of the villagers were apparently sympathetic to the Soviet cause, all were arrested, and eventually killed, and the village was burned.* The dragnet was large, and no doubt encompassed some who were not sympathetic to the Communists, and who in fact may have held no political views at all. Nevertheless, *the actions carried out against the Audrini villagers were initiated because of the political opinions held by some of the inhabitants.* Under these circumstances, we have no difficulty in concluding that the persecution in which the respondent assisted was based on political opinion and comes within the meaning of section 241(a)(19).
>
> In view of all the foregoing, we find, by clear, unequivocal, and convincing evidence that the respondent, under the direction of, and in association with, the Nazi German government, assisted and otherwise participated in the perse-

> cution of persons because of political opinion. Therefore, the respondent is deportable under section 241(a)(19) of the Act, and the sixth charge made against the respondent is sustained.

BIA Decision at 24 (emphasis added; footnote omitted). In support of this finding, the record includes expert testimony that, as a general matter, the local police were always used by the Nazis during "purges of undesirable elements," Testimony of Dr. Wolfgang Scheffler at 73, among whom the Nazis included Communists, *id.* at 47. This testimony was supported by many documents dated during the period surrounding the Audrini incident and Maikovskis's tenure as police chief. Some of these documents reflected the Nazi regime's desire to rid Latvia of Communists, and some indicated that the villages surrounding Rezekne, including Audrini, were suspect for political reasons.

For example, a July 1941 SS report, referring to the area surrounding Rezekne, stated: "[s]tarting July 7 the surrounding towns and forests will be systematically combed for members of the Red Army and native Communists . . . The police detachments have been instructed to bring leading Communists into the jail at Rezekne." An SS report for the period "up to 15 October 1941" described these efforts in the Baltic area, stating, *inter alia*:

> "2. *Combating Communism*
>
> Everywhere in the area of operation counteractions against communism and Jewry took first place in the work of the Security Police.
>
> b) *Search for and Arrest of Communists.*
>
> . . . [A] systematic search was made for Communist functionaries, Red-Army soldiers, and persons more seriously suspect because of their activities for Communism . . . .

. . . .

> The extent of this cleansing in line with the counteractions against Communism may be seen in the survey on Encl. 8 which gives the number of people executed."

A copy of a document dated December 31, 1941, which bore an indication that the original had been signed by Maikovskis's immediate supervisor, stated that "[d]uring the last six months, our work has been dominated by [*inter alia*] our desire to free ourselves of Communist and Jewish leftovers . . . ." And an SS report dated February 2, 1942, subsequent to the Audrini incident, noted:

> The inhabitants of the village of Audrini are Russians—of orthodox faith—all told 48 families. Blind in their nationalism, they supported the Red Armyists 100%. In this village of Audrini there lived 5 armed Red Army men, 3 former members of the Militia, 3 prisoners of war who had escaped from prison camps, and 11 former prisoners of war.

We conclude that the evidence in the administrative record provided reasonable, substantial, and probative support for the BIA's finding that the Nazis persecuted the Audrini villagers because of their political opinions.

Maikovskis urges that we reach the opposite conclusion on the basis that two Latvian policemen had earlier been killed by Communist partisans thought to be hiding in the village of Audrini and that the Audrini incident was a military law-enforcement response to these killings. The Board rejected this contention, noting that there was no evidence that any attempt had been made to ferret out those who had shot the policemen or those who had harbored the killers. It could only conclude that such "wanton destruction and general penalty" as occurred constituted persecution of the type targeted by Congress in § 241(a)(19). BIA Decision at 23. Even if the

Board's decision may be read as finding that the Audrini incident was in part a result of the earlier killing of the two policemen, it is clear that the Board concluded that political opinion was the principal motivating factor in the persecution. Since we see no basis in the statute for requiring that the government prove that political opinion was the sole motivation for the persecution, and since we conclude that there was adequate support for the finding that the villagers' political opinions were at least a major motivation for the persecution, we reject Maikovskis's contention that the earlier killing of the two Latvian policemen meant that the mass arrests and wholesale arson did not occur "because of" political opinion.

Finally, we are unpersuaded by the argument that because the Board hypothesized that perhaps not all of the Audrini villagers were Communist sympathizers, the mass arrests and wholesale arson should not be viewed as having been undertaken "because of" the villagers' political opinions. The documents introduced at the hearing provided ample evidence that the Nazis sought to rid the Rezekne area of Communists; and no evidence was forthcoming to explain in any other way the wholesale scope of the arrests and burning of the entire village. The evidence in the record as a whole thus justified the Board's finding that the persecution was undertaken because of the villagers' political opinions.

We have considered all of Maikovskis's other arguments in support of this petition for review and have found them to be without merit.

CONCLUSION

The petition for review is denied.

Appendix A
Opinion of United States Court of Appeals

JON O. NEWMAN, *Circuit Judge,* concurring in part and dissenting in part:

I agree with the majority that Maikovskis was properly found deportable under section 241(a)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1251(a)(1) (1982), for failure to disclose his police service during the Nazis occupation of Latvia, a disclosure that would probably have led to knowledge of his role in the Audrini episode, which in turn would have warranted his exclusion under the Displaced Persons Act. But I respectfully dissent from the additional holding that Maikovskis has properly been found deportable under section 241(a)(19) of the Act, 8 U.S.C. § 1251(a)(19), for participation in an act of political persecution. The additional ground renders Maikovskis ineligible for discretionary relief under sections 241(f), 243(h)(2)(A), and 244(a) of the Act, 8 U.S.C. §§ 1251(f), 1253(h)(2)(A), and 1254(a) (1982), a matter of significance to this 81-year-old man who has resided in this country for 33 years.

The issue under section 241(a)(19) is whether Maikovskis participated in persecution of the Audrini villagers "because of" their "political opinions." The horror of the episode, still vivid despite the passage of 44 years, must not deter us from requiring faithful compliance with applicable substantive and procedural requirements of administrative law. This is especially so when the administrative task is the difficult one of determining the precise motivation for actions taken four decades ago during a war. Though the events of the episode were properly found by the Board of Immigration Appeals (BIA), the issue of motivation, on which the applicability of section 241(a)(19) turns, has not, in my view, been properly resolved by the Board, nor has Maikovskis been accorded a fair opportunity to participate in the resolution of that critical issue.

The key facts may be briefly summarized. In December 1941, while Germany and the Soviet Union were at

war, Soviet partisans hiding in the Latvian village of Audrini, then under German occupation, killed at least two Latvian police officers. As a reprisal for those killings and as a warning to other villages not to harbor Soviet partisans, the Nazis ordered swift and brutal retaliation: All the villagers of Audrini, some 200 to 300 men, women, and children, were arrested and shot, and their village was burned to the ground. Boleslavs Maikovskis, a Latvian native, had been installed by the Nazis as a chief of a police precinct for the area that included Audrini. Maikovskis ordered his Latvian police officers to assist German soldiers in arresting the villagers and burning their town. It is not clear whether he or his police officers played any role in shooting the villagers.

1. *The merits of the section 241(a)(19) decision.* The persecution charge presented the BIA with a difficult question of ascertaining motive. Were the Audrini villagers arrested and shot as an act of reprisal for the harboring of the partisans who had shot the Latvian policemen, or as a persecution of the villagers for the political opinions held by some of them, or for both reasons, with political persecution of sufficient significance to satisfy the motivation requirement of the statute?

The BIA answered this difficult question with the following sentences:

> The inhabitants of Audrini, who were Latvian, and whose faith was apparently Orthodox, were persecuted *because* Soviet partisans had been found hiding in the village. As a result of the fact that some of the villagers were apparently sympathetic to the Soviet cause, all were arrested, and eventually killed, and the village was burned. The dragnet was large, and no doubt encompassed some who were not sympathetic to the Communists, and who in fact may have held no political views at all. Nevertheless, the actions

> carried out against the Audrini villagers were initiated *because* of the political opinions held by some of the inhabitants. Under these circumstances, we have no difficulty in concluding that the persecution in which [Maikovskis] assisted was based on political opinion and comes within the meaning of section 241(a)(19).

(citations omitted) (emphasis added).

As this critical excerpt makes clear, the BIA has made two findings as to motivation but offered no reasoned explanation as to how or whether the findings fit together. The first sentence says flatly that the persecution occurred "because Soviet partisans had been found hiding in the village." These were the partisans who had shot the Latvian policemen. Thus the BIA finds that the persecution was an act of reprisal. Then the BIA says the action was "initiated because of the political opinions held by some of the inhabitants." If true, this would be the political motivation required for deportation under section 241(a)(19). But the BIA has not offered a word of explanation to assist us in reviewing these two facially inconsistent findings. Indeed the BIA has not even recognized that its findings create an issue of dual motivation, nor provided any basis for determining how it resolved the issue, much less whether it did so in conformity with the standard enunciated in this Court's decision. Several possibilities come to mind. The action was essentially an act of reprisal, as the BIA first concludes. Or the action was essentially an act of political persecution with reprisal only a pretext for taking action against Communist sympathizers. Or the action was based on dual motivation with reprisal the initiating cause and political motivation the reason for the extent and severity of the reprisal action. Or the BIA has not fully appreciated the problem of dual motivation and has yet to determine precisely what its thinking is as to the extent to which political motivation prompted the action.

We have been given an inadequate basis for determining the correctness of the administrative decision. What little may be gleaned from the BIA's account of the episode serves only to perpetuate uncertainty. For example, the BIA states, "The burning of the entire village of Audrini hardly served the claimed purpose of ferreting out and punishing only the guilty villagers." That observation does not show that political motivation was present in addition to reprisal motivation; it simply fails to reckon with the brutality of wartime reprisals. If the Nazi occupiers had identified only the specific villagers who had harbored the partisans who had shot the policemen, retribution against these individuals would have been punishment, not reprisal. The whole point of wartime reprisal, offensive as it may be, is to inflict suffering and even death on innocent persons to deter others from future hostile acts out of concern for the plight of innocent victims.

A reasoned explanation could readily be supplied if the evidence showed that in some villages in Nazi-occupied territories retribution for harboring partisans who had shot local collaboraters was normally confined to guilty individuals, with mass reprisal action, such as that taken in Audrini, occurring only in communities with significant political sympathy for Communists or others opposed to the occupying regime. But we have no reason to believe that the BIA views the evidence in this light, and it is far from clear that such a conclusion would be warranted on this record.

I agree with the majority that the BIA need not find that political motivation was the "but for" cause of the Audrini massacre. Unlike dual motivation issues that arise in the context of adverse action based on both improper conduct and protected activity such as exercise of First Amendment rights, *see Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977), or rights under the National Labor Relations Act, *see N.L.R.B. v. Charles Batcheider Co.*, 646 F.2d 33 (2d Cir.

1981), there is no need to protect acts of wartime reprisal. Whatever the status of such actions under military or international law, we need not insist that political motivation be the "but for" cause of the persecution that is grounds for deportation under section 241(a)(19) since action taken in part as a wartime reprisal may properly be a basis for deportation without impairing any protected rights of the alien. I therefore agree with the majority that political opinion need be only a "major motivation" for the persecution that occurred at Audrini. However, I do not agree that the BIA has provided a reasoned explanation from which we can determine whether it has properly analyzed the problem of dual motivation presented by the case and fairly determined that political opinions were a "major motivation" for the fate of the Audrini villagers.

2. *Procedural fairness in reaching the section 241(a)(19) decision.* In light of the importance of careful consideration by the BIA of the dual motivation issue, it is essential that Maikovskis be afforded a full and fair opportunity to challenge before the BIA the Government's contention that the political opinions of the Audrini villagers were a sufficient motivation for the massacre to justify deportation under section 241(a)(19). Regrettably, the actions of the Government denied Maikovskis that opportunity. The Audrini episode was withdrawn from the case as a basis for seeking to establish deportation under section 241(a)(19), and, on the administrative appeal by the Government to the BIA, no claim was made that the Audrini episode constituted grounds for finding Maikovskis deportable under that subsection. Maikovskis has thus been denied the most elemental aspect of due process—an opportunity to be heard.

As the case was initially presented to the Immigration Judge, the charge of deportation under section 241(a)(19) was sought to be supported by various specific allegations, three of which concerned the Audrini episode.

The events at Audrini were included in Allegations 11, 12, and 13. After the hearing record was closed, the Immigration Judge met with counsel for both sides in an effort to clarify and, if possible, narrow the issues on which decision was required. At the conference the Government explicitly stated that it was not relying on the Audrini episode in support of Charge VI, the only charge brought under section 241(a)(19). The Immigration Judge made inquiry to pin the matter down:

> The Immigration Judge: And you do not include 11, 12 and 13 . . . right?
>
> Counsel for the Government: That is correct.

A chart of the charges and those factual allegations relied on by the Government in support of the charges was prepared by the Immigration Judge and shows that Allegations 11, 12, and 13 formed no part of Charge VI. The Government has not claimed otherwise.

After the Immigration Judge ruled in favor of Maikovskis, the Government appealed to the BIA. The Government's briefs before the BIA make it absolutely clear that it was not seeking deportation under section 241(a)(19) based on the Audrini episode. Having disclaimed reliance on Allegations 11, 12, and 13 in support of Charge VI before the Immigration Judge, the Government sought to have the BIA consider the Audrini episode solely in connection with the claim that Maikovskis should be deported as a person who was excludable under the Displaced Persons Act. Unlike section 241(a)(19), the Displaced Persons Act makes no mention of political motivation in describing persecution, participation in which renders a person excludable. In urging the BIA to find that Maikovskis was excludable under the Displaced Persons Act, the Government relied exclusively on section 2 of that Act, which bars from entry those who "assisted the enemy in persecuting civil

populations."[1] The claim that Maikovskis was excludable under the Displaced Persons Act was set forth in Charges II, V, and VII, not Charge VI, the only charge that alleged deportability under section 241(a)(19). Having abandoned the Audrini episode as a basis for seeking deportation under section 241(a)(19), the Government made no argument whatever that the Audrini massacre was motivated by any of the factors listed under section 241(a)(19). Indeed, responding to the Immigration Judge's finding that the massacre had not been racially motivated, the Government argued that the persecution of the Audrini villagers "does not have to be based on race, religion or national origin. The inhabitants of Audrini were persecuted because they lived in Audrini." Government's Brief to the BIA at 22-23 (footnote omitted). The Government's only claim about the Audrini episode on its appeal to the BIA was that Maikovskis' conduct there made him "ineligible [for entry] under the DP [Displaced Persons] Act." *Id.* at 57.

The majority does not challenge Maikovskis's essential point that due process does not permit a government agency to abandon an allegation and later proceed against a person on the basis of that allegation. Instead, the majority maintains that the Government's disclaimer does not require a remand of the section 241(a)(19) determination because Maikovskis originally had notice of the allegation and was not prejudiced by the subsequent disclaimer. With deference, I do not believe these

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[1] Section 2 of the Displaced Persons Act of 1948 incorporated the definition of "displaced persons" contained in Annex I of the Constitution of the International Refugee Organization (IRO) Act of June 25, 1948, 62 Stat. 1009 (1948), as amended by Act of June 16, 1950, 64 Stat. 219 (1950). The IRO Constitution precluded from "displaced person" status any person who "assisted the enemy in persecuting civil populations." Section 13 of the Displaced Persons Act, as amended in 1950, prohibited the issuance of visas under the Act to any person who "assisted in the persecution of any person because of race, religion, or national origin." 64 Stat. 227.

considerations adequately reckon with the serious procedural flaw that has occurred. The notice recounted by the majority concerns the procedural stages of this case *before* the Government's appeal to the BIA. It is true that Maikovskis initially had notice that the Audrini episode would be urged in support of Charge VI. That notice may well have alerted him to the need to place in the record his evidence in defense of Charge VI. But Maikovskis is not contending that he lacked a fair chance to present evidence; his point is that, after prevailing before the Immigration Judge, he lacked a fair chance to persuade the BIA, on the Government's appeal, that the administrative record does not support a finding by the requisite standard of proof. *Woodby v. I.N.S.*, 385 U.S. 276 (1966), that the Audrini episode was based on political motivation sufficient to satisfy section 241(a)(19). That opportunity was foreclosed by the Government's action, first, in disclaiming any reliance on the Audrini episode in support of Charge VI, and, second, in pursuing the appeal to the BIA without any mention that the Audrini episode was being reclaimed as a basis for deportation under section 241(a)(19).

This absence of notice that political motivation for the events at Audrini would be at issue on the appeal to the BIA cannot, in my view, be said to have caused Maikovskis no prejudice. Unless appellate advocacy, whether before judicial or administrative tribunals, is to be deemed worthless, what happened in this case denied Maikovskis a significant opportunity to present his side of the dual motivation issue, a matter, as I have indicated above, that is exceedingly troublesome. This is not simply a case where an agency has relied on a fact adequately supported by the record though not particularly emphasized by the Government during the process of administrative appeal. Here the key issue of political motivation was explicitly taken out of the case by the Government's disclaimer before the Immigration Judge and kept out of the case on the appeal to the BIA.

In sum, this case should be returned to the BIA for further consideration of the section 241(a)(19) ground of deportation for two reasons: The BIA has not provided a reasoned explanation as to how it concluded that political opinions of the Audrini villagers were a sufficient motivation for the Audrini episode, beyond the BIA's stated reason of wartime reprisal, to satisfy section 241(a)(19), and Maikovskis has not been accorded a fair opportunity before the BIA to present his side of the political motivation issue. Perhaps, after notice to Maikovskis that political motivation will be the issue on the administrative appeal and despite his counsel's argument, the BIA upon reconsideration could articulate a rationale for concluding that arresting and shooting all the villagers was not only an act of wartime reprisal but also a persecution based on their political beliefs. But such notice and opportunity to be heard have not yet been afforded, and Maikovskis should not be deported under section 241(a)(19) unless and until a procedurally and substantively valid decision has been made.

Appendix B
Order of United States Court of Appeals On Petition for Rehearing and Suggestion for Rehearing *En Banc*

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 12th day of November, one thousand nine hundred and eighty-five.

BOLESLAVS MAIKOVSKIS,

Petitioner,

-v-

IMMIGRATION & NATURALIZATION SERVICE,

Respondent.

Docket No. 84-4143

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the Petitioner-MAIKOVSKIS

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ _____

Elaine B. Goldsmith
Clerk

Appendix C
Decision of the Board of Immigration Appeals
Dated August 14, 1984

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
FALLS CHURCH, VIRGINIA 22041

File: A8 194 566 - New York City

In re: BOLESLAVS *MAIKOVSKIS*

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:
Ivars Berzins, Esquire
484 West Montauk Highway
Babylon, New York 11702

ON BEHALF OF SERVICE:
Neal M. Sher, Acting Director
Jeffrey N. Mausner, Trial Attorney
Office of Special Investigations
Criminal Division
U.S. Department of Justice
1377 K. Street, N.W., Suite 195
Washington, D.C. 20005

ORAL ARGUMENT: January 31, 1984

CHARGE:

Order: Sec. 241(a)(1), I&N Act [8 U.S.C. 1251(a)(1)]- Excludable at time of entry, to wit, not entitled under Act of May 26, 1924, to enter because immigrant visa procured by fraud or misrepresentation

Sec. 241(a)(1), I&N Act [8 U.S.C. 1251(a)(1)]- Excludable at time of entry, to wit, an alien not entitled under section 10 of the Displaced Persons Act of June 25, 1948, as amended by the Act of June 16, 1950, to enter because immigrant visa procured by willful misrepresentation of material facts

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Sec. 241(a)(1), I&N Act [8 U.S.C. 1251(a)(1)]- Excludable at time of entry, to wit, a person whose admission would be prejudicial to the interest of the United States under the Act of May 22, 1918, as amended by the Act of June 21, 1941, Presidential Proclamation No. 2523 issued on November 14, 1941, as amended by Presidential Proclamation No. 2850 issued on August 17, 1949, and section 175.53 of Title 8 of the Code of Federal Regulations

Sec. 241(a)(1), I&N Act [8 U.S.C. 1251(a)(1)]- Excludable at time of entry, to wit, immigrant not in possession of valid immigrant visa, in violation of section 13(a) of Act of May 26, 1924

Sec. 241(a)(1), I&N Act [8 U.S.C. 1251(a)(1)]- Excludable at time of entry, to wit, person who, under sections 2, 10, and 13 of the Displaced Persons Act of June 25, 1948, as amended by the Act of June 16, 1950, was inadmissible as one who advocated or assisted in the persecution of any person because of race, religion, or national origin

Sec. 241(a)(19), I&N Act [8 U.S.C. 1251(a)(19)]- Ordered, incited, assisted, or otherwise participated in persecution of persons because of race, religion, national origin, or political opinion, in association with the Nazi government, or government in any area occupied by the Nazi government, or established with the assistance or cooperation of

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the Nazi government, or ally of the Nazi government, during the period from March 23, 1933, to May 8, 1945

Sec. 241(a)(1), I&N Act [8 U.S.C. 1251(a)(1)]- Excludable at time of entry, to wit, person who, under section 13 of Displaced Persons Act of June 25, 1948, as amended by the Act of June 16, 1950, was inadmissible as one who was a member of or participated in a movement hostile to the United States or the form of government of the United States

APPLICATION: Termination of proceedings; alternatively waiver of deportability under section 241(f); suspension of deportation; asylum/withholding of deportation; voluntary departure

In a decision dated June 30, 1983, an immigration judge ordered the deportation proceedings against the respondent terminated. The Government appealed. Oral argument was heard before the Board on January 31, 1984. The appeal will be sustained and the respondent will be ordered deported.

HISTORICAL BACKGROUND

The alleged events leading to the issuance of the Order to Show Cause (Form I-221) took place primarily in and around Rezekne, Latvia in 1941 and 1942, during World War II. Latvia is one of three small Baltic nations located on the eastern shore of the Baltic Sea. It is located between the other Baltic states, Estonia to the north and Lithuania to the south. Across the Baltic Sea to the west is Sweden. Latvia's eastern border is with the Soviet Union. Latvia encompasses an area of approxi-

mately 25,000 square miles. Its capital is Riga. The small city of Rezekne is located approximately 125 miles east of Riga.

Latvia was a part of the Russian empire from the time of Peter the Great's defeat of the Swedish empire early in the 18th century until the collapse of the Russian empire in 1917. Following the Russian Revolution and Russia's withdrawal from World War I, Latvia, as well as Estonia and Lithuania, were briefly occupied by German forces. In 1918, all three Baltic states declared their independence. They remained independent until 1940, at which time they were annexed by the Soviet Union following the 1939 German-Soviet non-aggression pact. On June 22, 1941, Nazi German armed forces invaded the Baltic states, forced out the Soviet troops, and quickly drove to Leningrad where the war front stabilized. Nazi Germany then established occupation governments in Latvia and the other Baltic states. They remained under Nazi German rule from 1941 until the German Army was driven out of the Baltic states by the Soviet Union in 1944-1945. Following the defeat of Germany, the Soviet Union once again annexed the three Baltic nations. The United States has never recognized the legitimacy of the Soviet annexation.[1]

PROCEDURES UNDER THE DISPLACED PERSONS ACT

Because the respondent was admitted to the United States under the Displaced Persons Act of June 25, 1948, as amended by the Act of June 16, 1950 (hereinafter the DPA), and many of the charges of deportability relate

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[1] *See generally*, A. Clark, *Barbarossa-The Russian-German Conflict, 1941-1945* (1965); *Times Atlas of World History*, 144 (2d ed. 1979); *Country Reports on Human Rights Practices for 1983*, 689, U.S. Department of State (1984).

directly or indirectly to the lawfulness of that admission, we think it would be helpful to briefly describe the immigration procedures under that Act, and the provisions of the Act which are pertinent to this case.[2] Congress enacted the DPA in 1948 in order to enable European refugees who had been driven from their homelands by the war to emigrate to the United States without regard to the regular immigration quotas. Under the normal procedures, a person who sought to come to the United States under the DPA first filed an application for I.R.O. (International Refugee Organization) assistance. In order to determine if a person was an eligible refugee, an I.R.O. eligibility officer interviewed the applicant regarding his personal and family history, with emphasis on the war years. The primary source of information for the I.R.O. report was the applicant himself.

If found to be qualified, the refugee was granted I.R.O. assistance. It was only at this point, after I.R.O. eligibility had been established, that the refugee could apply for status as an eligible displaced person under the DPA.[3] The I.R.O. file containing the applicant's history and the I.R.O. certification was forwarded to the Displaced Persons Commission, the agency in charge of implementing the DPA. Security checks were then made by a case analyst and further investigation was conducted if deemed necessary. If the applicant was found eligible, the case analyst issued a Displaced Persons Commission report certifying that the applicant was a

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[2] Our description of the procedures is drawn from the testimony of witnesses who appeared in these proceedings, and from consistent descriptions provided in the case law. *See e.g. United States v. Demjanjuk*, 518 F.Supp. 1362, 1378-1379 (N.D. Ohio 1981), *aff'd* 680 F.2d 32 (6th Cir. 1982).

[3] *See* section 2(b) of the DPA, which specifically required eligibility under the I.R.O.

person who qualified for admission into the United States under the DPA.

Following certification by the Displaced Persons Commission, the applicant's file was sent to the appropriate American consulate. The applicant appeared at the consular office, and, assisted by an interpreter-typist, filled out an application for an immigrant visa. An American vice-consul then reviewed the entire file and interviewed the applicant regarding the contents of the file and the visa application. The vice consul then determined if the applicant did in fact meet all the criteria of the DPA and other immigration laws. If so, the visa was issued.

The portions of the DPA which are especially pertinent to the instant case are sections 2(b), 10, and 13. Section 2(b) defined "displaced person" as "any displaced person or refugee as defined in Annex I of the Constitution of the International Refugee Organization and who is the concern of the International Refugee Organization." Annex I, Part II of the I.R.O. Constitution provided, in relevant part, that certain persons would not be the "concern" of the I.R.O.[1] These persons included:

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[1] Counsel for the respondent has suggested that the I.R.O. Constitution may not apply to Latvia, apparently because that Constitution is a United Nations document and Latvia, as an independent nation, is not a member of the United Nations, and, additionally, the Constitution was never ratified by the Soviet Union. Counsel states that the Government has never established what protection, if any, the United Nations gives Latvia. Counsel has cited no authority for the proposition that the I.R.O. requirements, which had to be met by all persons seeking admission to the United States as displaced persons, did not apply to applicants from Latvia, and we are aware of no cases to that effect.

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1. War criminals, quislings and traitors.

2. Any other persons who can be shown:

(a) to have assisted the enemy in persecuting civil populations of countries, Members of the United Nations; or

(b) to have voluntarily assisted the enemy forces since the outbreak of the second world war in their operations against the United States.

Section 10 of the DPA provided, in pertinent part, that "[a]ny person who shall willfully make a misrepresentation for the purpose of gaining admission into the United States as an eligible displaced person shall thereafter not be admissible into the United States." Section 10 also specifically placed the burden of proving eligibility for displaced person status upon the applicant.

Finally, section 13 of the DPA provided that

> [n]o visas shall be issued under the provisions of this Act, as amended . . . to any person who is or has been a member of or participated in any movement which is or has been hostile to the United States or the form of government of the United States, or to any person who advocated or assisted in the persecution of any person because of race, religion, or national origin, or to any person who has voluntarily borne arms against the United States during World War II.

BACKGROUND OF THE CASE AND NATURE OF THE CHARGES

The respondent is an 80-year-old native and citizen of Latvia. He was admitted to the United States as a lawful permanent resident on December 22, 1951, having been issued a visa under the provisions of the Displaced Persons Act. Deportation proceedings were initially

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begun against the respondent in October of 1976, and a superseding Order to Show Cause was issued on December 20, 1976. Hearings were held before the immigration judge on eight separate days from October 18, 1977 to December 14, 1977. Six Government witnesses were presented at the 1977 proceedings. The Government also sought to have the respondent testify, but he refused to do so. At the close of the December 14, 1977, session, the immigration judge issued a subpoena compelling the respondent to testify. The United States District Court for the Southern District of New York, on March 10, 1978, issued an order also compelling the respondent to testify (Exh. 88). This order was upheld by the United States Court of Appeals for the Second Circuit on September 13, 1978 (Exh. 78).

In the meantime, on April 15, 1978 the Government filed a motion to take depositions in Latvia. The immigration judge denied that motion on August 22, 1978, and the Acting Commissioner of the Immigration and Naturalization Service certified the immigration judge's decision to us for review in March of 1980. In a January 9, 1981, decision, we ordered that depositions in Latvia be allowed if necessary to the disposition of the case. The depositions were taken in Riga, Latvia, in May of 1981.

Following the taking of these depositions, deportation proceedings were resumed before the immigration judge on July 20, 1981. Additional allegations and charges were brought against the respondent.[5] After 10

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[5] By letter dated August 3, 1981, the Government withdrew certain allegations and charges made against the respondent (Exh. 89). These allegations and charges were based primarily on the testimony of five of the witnesses heard during the 1977 proceedings (witnesses Jacob Noy, Chawa Ljak, Ida Treger, Lea Kaner, and Lea Rosenberg Gordon). The Government has stated that it does not now rely on any of that testimony to prove any of the current allegations and charges. Government's brief on appeal at 6, n. 2. We have not relied on any of this testimony in making our decision.

additional sessions, the Government and the respondent concluded their cases. Another hearing was held before the immigration judge on April 28, 1983, at which counsel for both parties reviewed with the immigration judge the final lists of allegations and charges made against the respondent. These final allegations and charges are found in Exhibits 133 and 134, respectively.

The general nature of the allegations against the respondent is that he was employed as a policeman in the Second Police Precinct of the Rezekne County Police Department in Rezekne, Latvia, during the years 1941 to 1943; that in that capacity he participated or assisted in various acts of persecution against the civilian population; and that he misrepresented his wartime activities in order to establish his eligibility as a displaced person and gain admission to the United States. The Government charged that on the basis of his activities, his employment as a Latvian policeman, and his misrepresentations with regard to his activities and employment, he was deportable on seven separate grounds.

First, the respondent was charged with deportability under section 241(a)(1) of the Immigration and Nationality Act, 8 U.S.C. 1251(a)(1) (hereinafter the Act), in that he was excludable at entry as an immigrant not entitled to enter the United States under the Immigration Act of May 26, 1924, because his immigrant visa was procured by fraud or misrepresentation. While the Immigration Act of May 26, 1924, did not contain a specific statutory ground of excludability based on misrepresentation, it did provide that an alien is excludable unless he has an unexpired immigrant visa. *See* section 13(a)(1) of that Act. Cases interpreting section 13(a) of the 1924 Act have held that a visa obtained through a material misrepresentation "is not a valid visa and hence is no visa." *Ablett v. Brownell*, 240 F.2d 625, 629 (D.C. Cir. 1957). *See also United States v. Shaughnessy*, 186 F.2d 580 (2d Cir. 1951).

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The respondent was next charged with deportability under section 241(a)(1) of the Act for being excludable at entry under Section 10 of the Displaced Persons Act, as amended. As noted above, section 10 provided, inter alia, that "[a]ny person who shall willfully make a misrepresentation for the purpose of gaining admission into the United States as an eligible displaced person shall thereafter not be admissible into the United States."

The third charge against the respondent is that he is deportable under section 241(a)(1) of the Act for being excludable at entry as a person whose entry would be prejudicial to the interests of the United States under the Act of May 22, 1918,[6] as amended by the Act of June 21, 1941, Presidential Proclamation No. 2523 issued on November 14, 1941, as amended by Presidential Proclamation No. 2850 issued on August 17, 1949, and section 175.53 of a prior version of Title 8 of the Code of Federal Regulations. The Presidential Proclamations and the old version of Title 8, as well as the Act of May 23, 1918, all relate to the inadmissibility of aliens whose entry into this country would be prejudicial to the interests of the United States.

The respondent was further charged with deportability under section 241(a)(1) of the Act as an alien excludable at entry under section 13(a) of the Act of May 26, 1924. This alternate charge under section 13 of the May 26, 1924, Act apparently relates to subsection (a)(5) of section 13, which requires that an alien be "otherwise admissible." The theory here is that if the respondent was inadmissible under the Displaced Persons Act, then he was excludable under the Act of May 26, 1924, as well.

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[6] Although the Order to Show Cause speaks of the Act of May 23, 1918, the correct date of the Act is May 22, 1918.

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The respondent was also charged with being deportable under section 241(a)(1) of the Act as an alien excludable at entry under sections 2, 10, and 13 of the Displaced Persons Act, as a person who advocated or assisted in the persecution of any person because of race, religion, or national origin.

He was charged as well with deportability under section 241(a)(19) of the Act in that, between March 23, 1933, and May 8, 1945, he ordered, incited, assisted or otherwise participated in the persecution of persons because of race, religion, national origin, or political opinion, under the direction of, or in association with the Nazi Government of Germany, any government in any area occupied by the military forces of that government, any government established with the assistance or cooperation of the Nazi government of Germany, or any government which was an ally of the Nazi Government of Germany.

Finally, the Government charges the respondent with being deportable under section 241(a)(1) of the Act in that he was excludable at the time of entry under section 13 of the Displaced Persons Act because he was a member of or participated in a movement that was hostile to the United States or the form of government of the United States.

Among the some 135 exhibits (some consisting of several parts) presented during these proceedings were the documents relating to the respondent's original admission to the United States. Included was an "Application for I.R.O. Assistance," signed by the respondent on December 31, 1949 (Exh. 40). In the employment history of that form, the respondent indicated that he had been employed as a farm worker in Rezekne District, Latvia from October 1939, to December 1941, and as a bookkeeper employed by the Latvian Railway Department in Riga from December 1941 to October 1944. On

January 11, 1950, the I.R.O. certified the respondent was a displaced person eligible for care and maintenance. Exh. 40.

Exhibit 38 consists of the respondent's Application for Immigration Visa and Alien Registration (Form 256a), signed by the respondent on November 13, 1951, and his Immigrant Visa and Alien Registration. The visa package reflects that the respondent was found eligible for an immigrant visa based on a report of the Displaced Persons Commission. This report, dated November 8, 1951, is Exhibit 59. It states that a thorough investigation into the respondent's background has been conducted and it was found that the respondent was employed as a farm worker from October 1939, to December 1941, and as a bookkeeper from December 1941, to October 1944. The report further states that the respondent has not advocated or assisted in the persecution of any person because of race, religion, or national origin, and has not been a member of any movement hostile to the United States or our form of government.

Exhibit 41 consists of the respondent's "Curriculum Vitae," prepared by the respondent in connection with his application for an immigrant visa, and signed on October 2, 1950. This document states that the respondent worked on a farm from 1940 to 1941, and then worked as a bookkeeper until 1944.

Based on these documents, the respondent was found to be admissible to the United States. When he reached this country he executed, on December 22, 1951, an "Affidavit as to Subversive Organizations or Movements" (Form I-144) (Exh. 39). The affidavit states, inter alia, that the respondent has not been a member of or participated in any movement which is or has been hostile to the United States or our form of government, and that he never advocated or assisted in the persecution of any person because of race, religion, or national origin.

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In addition to the above-described documents relating to the respondent's admission to the United States as a displaced person, the Government also submitted into evidence five prior sworn statements of the respondent, dated January 21, 1966 (Exh. 13), February 15, 1966 (Exh. 14), August 14, 1975 (Exh. 15), February 12, 1976 (Exh. 16), and September 2, 1976 (Exh. 17). In the first of these statements, the respondent continued to assert, as he had on his immigration papers, that he was employed as a bookkeeper after the Germans invaded Latvia. In the second statement, he admitted that he acted as a temporary "keeper of order" after the Germans occupied Latvia, but denied that he was ever a police officer, that he ever arrested people or ordered arrests, that he ever cooperated with the German Government, or that he knew of the arrests and killings of Jews and gypsies in the Rezekne area.

By the time of the respondent's 1975 statement, he was no longer denying that he was a police officer during World War II. By the time the respondent's deportation hearing reconvened in July of 1981, he had stipulated that he was in fact the Chief of Police of the Second Police Precinct in Rezekne from August of 1941 until 1944, when the Germans began their retreat. The respondent now also admits to limited involvement in an incident involving the residents of Audrini, a small village within his precinct, which culminated in the executions of all the villagers. According to numerous accounts, the trouble in Audrini began when two or more Latvian policemen were shot to death in the village by Soviet partisans who had been hiding there. There was evidence to the effect that the village was known to harbor Soviet partisans. Tr. at 75, 424, 430;[7] Exh. 24-10.

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[7] Unless otherwise noted, transcript pages refer to the transcripts from the proceedings held in 1981 and 1982.

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The killing of the policemen occurred on or about December 18 and 21, 1941. On or about December 22, 1941, all of the 200-300 Audrini residents were arrested. The respondent conceded that he ordered the arrests of all the villagers, but stated that he had no choice: his orders came from his Latvian Superior A. Eichelis, the Chief of Police of Rezekne District, who in turn received his orders directly from the Germans. Tr. at 365-367, 371-372. The respondent also now admits that following the arrests, he ordered that Audrini itself be burned. Again, he testified that his orders to burn the village were based on directives from his superiors. The village was burned to the ground on approximately January 2, 1942.

The respondent has continued to deny, however, that he in any way participated in subsequent events. He denies that he had any role in the public executions, in the Rezekne market square, of 30 of the Audrini villagers. These people were apparently executed in public as a warning to all Rezekne residents not to aid the Soviets. The respondent testified that he was in church when these executions were carried out. Tr. at 362-364. He states that he did not know who shot these people, but that he "heard" it was both Germans and Latvians. Tr. at 364. He also denies any involvement in the massacre of all the rest of the villagers, who apparently were trucked to an area within the respondent's precinct, known as the Ancupani hills, and there shot to death.

It is the Government's position that the respondent is deportable even on the facts now admitted by the respondent, and found by the immigration judge. The Government asserts that the respondent's failure to reveal that he was a Latvian police chief when he applied for displaced persons status was a willful misrepresentation of a material fact which warrants a finding of deportability. It is further asserted that the respondent's membership in the Latvian police in and of itself made him ineligible as a displaced person and thus

deportable. In addition, the government claims that the respondent did in fact assist in the persecution of persons and that he is deportable on those grounds as well.

THE DEPOSITIONS TAKEN IN LATVIA

Before beginning our analysis of the charges made against the respondent, we find it appropriate to comment on an issue which has been the subject of considerable attention both at the hearings below and on appeal. This is the issue of the seven videotaped depositions taken in Riga, Latvia in May of 1981. The Government has placed considerable reliance on six of these depositions in order to prove certain aspects of its case. The immigration judge gave virtually no weight to the videotaped depositions, finding them "unconvincing as testimonial evidence on their face." Immigration judge's decision at 13. The Government, which presented witnesses at the hearing to show that the depositions were reliable, argues at some length on appeal that the Soviet witnesses were credible, that the depositions as a whole were reliable, and that the Board should view and consider the videotapes independently. Counsel for the respondent also presented a witness on the issue of the reliability of the depositions, to show that the Soviet-controlled conditions under which they were taken rendered them inherently unreliable. He asserts that the immigration judge gave the depositions the weight they deserved.

We find it unnecessary to decide the thorny question of what weight these depositions should be given, since we have been able to make determinations of deportability without relying in any way on that disputed evidence.[8] Since we have not relied on these depositions, it is also unnecessary for us to address those arguments made by the respondent which relate to the depositions,

[8] We have not viewed the videotapes.

such as his assertions that he was given an inadequate time to prepare for the depositions, and was denied the right to cross-examination.

We turn now to the merits of the case.

PERSECUTION UNDER SECTION 241(a)(19)
Evidence Presented

The first witness called by the Government during the 1981 phase of these proceedings was Dr. Wolfgang Scheffler, an historian who is an expert on the National Socialist Regime and the persecution of Jews. Counsel for the respondent stipulated to Dr. Scheffler's expertise regarding those subjects. Tr. at 26.[9] The witness provided general background testimony and also testified in some detail on the role of local police units in Latvia during World War II. Dr. Scheffler testified at length on the organization of German police units and their relationship to the local indigenous police groups. Dr. Scheffler's testimony was supported by a number of captured Nazi documents which were admitted at the Nuremberg trials. These documents were admitted into evidence as exhibits 24-1 through 24-15. Counsel for the respondent did not object to the admission of these documents. The gist of Dr. Scheffler's testimony was that the Germans exercised ultimate control over the civilian police and the security police in Latvia.[10] According to Scheffler "[a]ll Latvian

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[9] We note that Dr. Scheffler was accepted as an expert historian witness in the case of *United States v. Demjanjuk, supra.*

[10] A lengthy analysis of the organizational structure of the Latvian police units and their role during the German occupation was provided in our decision in *Matter of Laipenieks*, Interim Decision 2949 (BIA 1983). The analysis provided in that case was based on the expert testimony of another witness, Dr. Raol Hilberg, as well as on captured German documents, many of which were also placed in evidence in this case. Hilberg's testimony, as reflected in the decision, was consistent with that provided by Dr. Scheffler in this case.

police forces were under German supreme command." Tr. at 52. *See* also exhibit 24-15, a December 7, 1942 letter from a Dr. Drechsler to the "Reich Commissar for the Ostland (Eastern Regions)" describing the chain of authority from the Reich Commander of the SS "down to the last police official," and stating that "[a]ll police personnel located in the General District of Latvia are directly under the German police authorities." Scheffler referred to the Latvian units variously as "self defense units," "auxiliary police forces," and as "regular police forces." The witness further testified that "all of these police forces were then taken together and summarized by or put together by the SS in the so called Schutzmannschaften." Tr. at 49.

Dr. Scheffler testified that while much of what the local police units did consisted of maintaining security and order, they also participated in clearing the ghettos and sometimes participated in mass executions of Jews and other civilians. Tr. at 47, 51, 77. The Nuremberg documents corroborated this testimony. *See* Exhs. 24-1, 24-2, 24-3, 24-6, 24-8. The witness testified that the Germans had to rely on the indigenous auxiliary forces because there were not enough German forces to carry out their policies against Jews, Communists, and other undesirables. As an example, the witness stated that as of October 1941, there were only 170 members of "Einsatzgruppe "A", [11] while there were 7000 Latvian police.

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[11]The Einsatzgruppen were small, mobile units of the Reich Security Main Office (RSHA). Tr. at 31. Einsatzgruppe "A" was the unit active in Latvia. Tr. at 34. Their mission included collecting secret materials and files, but according to Dr. Scheffler, "its major role was to eliminate what was called undesirable elements, which included the annihilation of Jews." Tr. at 34. Dr. Scheffler's testimony regarding the role of Einsatzgruppe "A" was corroborated by exhibit 24-1, a lengthy report from the commander of Einsatzgruppe "A", General Dr. Stahlecker, to Reichsfuehrer Heinrich Himmler, chief of the Nazi SS and second in command to Adolf Hitler. This report,

(footnote continued on following page)

Tr. at 56-58. Dr. Scheffler stated that it is his opinion that "in Rezekne as in other cities, the local forces participated in what was called self-purges." Tr. at 71. Again, this testimony is supported by documentary evidence of record. *See, e.g.*, Exh. 24-6, the August "Report for the War Diary," stating that hundreds of Jews were shot in Rezekne "by Latvian Self-Defense." Scheffler also stated that it would be difficult for a police chief to avoid such participation and stated his opinion that they usually did so willingly. Tr. at 72-74.

The respondent, having been compelled to testify by a second district court order, dated August 4, 1981 (Exh. 90), took the stand on September 1, 1981. He stated that he joined the Aizsargi, a Latvian self-defense organization, in 1932 after leaving the Latvian Army. Tr. at 347. According to the respondent, the Aizsargi was abolished in 1940 when the Communists took over in Latvia. Tr. at 347. He further testified that after the Russian Army left Latvia but before the Germans arrived he assisted in protecting the people. Tr. at 348. After the Germans arrived he became a member of the self-defense league and in August, 1941, became chief of the Second Police Precinct in Rezekne. He stated that the self-defense forces were absorbed into the formal police force in November or December of 1941. The respondent testified that he wore an Aizsargi uniform until the end of 1942, and that he then wore a German officer's uniform until 1944 when the Germans retreated from Latvia. Tr. at 351-352.

(footnote continued from preceding page)
dated October 15, 1941, was captured by the allies and was one of the documents used in the Nuremberg Trials. It describes in some detail the German policy of inducing the local police to cooperate in the "cleaning job" of eliminating "vermin-that is mainly the Jews and Communists." Exh. 24-1 at 5 (translation). *See also Matter of Laipenieks, supra*, for a detailed discussion of the role of Einsatzgruppe "A".

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The respondent insisted that it was not his duty as police chief to deal with the Jews or the Communists in his district and he further stated that there were only 50 Jews in his precinct, in the village of Kaunata. Tr. at 354-356. However, the respondent conceded that he thought that the Latvian police were involved in killing Jews in Rezekne generally, but he testified that he was not himself involved. Tr. at 361. He also stated that he did not believe that men under his own command were involved in the killings. Tr. at 361-362. The respondent admitted that his police assisted in the arrests of the residents of Audrini, and in the burning of that village. The respondent testified that he passed the order on for the police to be there but that he was not present himself during the arrests and the burning. Tr. at 365-367. He stated that he had no choice but to order the arrests in that the Germans through his Latvian superior Eichelis ordered him to do it. The respondent stated that he was not present when 30 of the villagers from Audrini were shot in the Rezekne market square, and that he knew nothing about these public executions. Tr. at 362-364. The respondent further maintains that he was not in any way involved in the massacre of the rest of the Audrini villagers in the Ancupani Hills. He could not have stopped the killing in any event. He stated that he does not know who shot the villagers in the Ancupani Hills but he heard a rumor that they were shot. Tr. at 369-370. The respondent denies that he ever engaged in any form of persecution. Tr. at 385.

To further support its charge that the respondent engaged in persecution, the Government submitted into evidence several documents specifically relating to the respondent's duties as police chief and his role in the Audrini incident. Among these were documents from the Central Historical Archives of the Latvian Soviet Socialist Republic. They were certified as authentic by the Soviet Embassy in Washington, D.C. Included in these

was Exhibit 84, a January 9, 1942, memorandum from the "Rezekne Dist. Police Prec't. 2 Chief" to the "Vice Prosecutor in the 2nd Precinct, Daugavpils Area Court." The report details the continuing efforts being made to apprehend "the Communist bandits" who killed Latvian policemen in and near Audrini in December of 1941. The memorandum also states that on December 22, on the order of the Territorial Commissar at Daugavpils, all Audrini residents were arrested, and on January 2, 1942, the village was burned. The report concludes with this unelaborated sentence: "Also, the inhabitants were shot to death, with 30 of the death sentences carried out in the Rezekne market square." This document carries a "copy correct" notation, indicating that it is not the original. The respondent's name appears on the document, along with the Latvian word for "signature," but the copy of the report is not actually signed. The Government on p. 18, no. 15 of its brief on appeal asserted that Exhibit 84 is a typed copy of the original sent to the Daugavpils Vice Prosecutor, and that the Secretary to the prosecutor typed the copy, noting that the respondent had signed the original. No explanation is offered as to why the original was not offered: presumably it was not found in the archives.

Counsel for the respondent contends that Exhibit 84 is ambiguous in that it does not make the date of the executions clear, and "does not come out and say that respondent participated." Respondent's brief at 10. He also questions why other exhibits produced by the Soviets (from the Latvian archives), such as Exhibit 62 (described below), were signed by the respondent, but Exhibit 84 was not. Counsel describes the Government's explanation for the lack of a signature on Exhibit 84 as "glib," and asserts that the Government "totally underestimate[s] the Soviets." *Id.* at 10-11. While it is not altogether clear, counsel appears to be suggesting that

the Soviets fabricated this document for their 1965 in absentia trial of the respondent.[12] No such showing has been made, however.[13]

Exhibit 62 is a January 3, 1942, report from the Chief of Rezekne District Police Precinct 2 to the Vice Prosecutor in the Second Precinct, Daugavpils Area Courts. It is a brief memorandum which states, inter alia, that "on orders of the German authorities, all the residents of Audrini village, Makaseni County, were imprisoned, but the village itself was burned." This authenticated document, which like Exhibit 84 came from the Central Historical Archives of the Latvian Soviet Socialist Republic, is signed by the respondent.[14]

Another authenticated document from the Latvian archives is exhibit 85, a December 31, 1941, memorandum entitled "Order 12," addressed to the Rezekne District

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[12] The respondent was tried for war crimes in the Soviet Union in 1965. He was convicted and sentenced to death.

[13] We note that even the respondent's witnesses were unable to cite any instance where the Soviet Union provided fraudulent documents for a trial in the United States. Tr. at 507; Exh. 131 (April 9, 1982 Deposition of Imants Lesinskis, made in the case of *United States, v. Kaiyrs* (Civ. Action No. 80 C 4302 (N.D. Ill.), at 45). *See* also discussion in *United States v. Linnas*, 527 F.Supp. 426 (E.D.N.Y. 1981), at 433-434, in which the court notes that "the defense witnesses were unable to cite *any* instance in a western court in which falsified, forged, or otherwise fraudulent evidence had been supplied by the Soviet Union to a court or other government authority." (Emphasis in original.)

[14] A number of known examples of the respondent's signature (including signatures on his immigration documents and on a check) were admitted into evidence for comparison with the signatures on the documents originating in the Latvian Archives. William Francis McCarthy, a certified document examiner for the Immigration and Naturalization Service, appeared for the Government in order to establish the respondent's signature. Counsel for the respondent accepted McCarthy as an expert witness on forensics. Tr. at 185. McCarthy testified that the signatures on the documents from the Archives were written by the same person as the one signing the known examples. Tr. at 194, 214. *See also* Exh. 118, McCarthy's affidavit. We are satisfied that the respondent signed the wartime documents bearing his name.

Police. Like exhibit 84, it is not actually signed, but the Latvian words for "original signed by" appear over the name A. Eichelis, the Rezekne District Police Chief and the respondent's immediate supervisor. The order thanks the police for work performed in 1941 and wishes them the best for 1942. The order expresses "deep confidence and trust" in "the bearer of the new era-Adolf HITLER." Reviewing the past year, the report notes that "[d]uring the last six months, our work has been dominated by our desire to free ourselves of Communist and Jewish left-overs, organize powerful police forces, and raise and develop our whole way of life." Exhibit 83, a December 17, 1943, memorandum to the Rezekne District Police from W. Celms, Police Major, Rezekne District Chief announces that the "Supreme SS and Police Commander in the Ostland" has awarded the "Iron Cross, 2nd Class, with swords," to the respondent.

The first witness called by the respondent was Elfrida Purgailis. This witness testified that she knew the respondent well in Rezekne, that they worked together there, and that she saw him regularly from 1934 to 1940. Tr. at 397-398. She testified that after 1940 she saw the respondent much less frequently, and did not know what he was doing, though she saw him in an Aizsargi uniform. Tr. at 399-401. The witness further testified that after the Germans arrived, many times she saw truck loads of women and children being taken to the Ancupani Hills and she heard that they were shot there. Tr. at 406. She stated that it was the Germans who took them there and that there was nothing to be done about it. Tr. at 406. The witness testified that she never heard of the respondent being involved "in such inhuman activities." Tr. at 407. She says that living in such a small town she heard about other people who were involved in the atrocities but she never heard that the respondent was involved. Tr. at 407. The witness stated that she did hear that the respondent had been named Chief of Police but

on cross-examination she admitted that she never saw the respondent perform any police duties since she did not live in his precinct. Tr. at 410-411.

The respondent's second witness was Constance Gaidulis. She testified that she was a good friend of the respondent in Rezekne and that they attended the same church. Tr. at 413-414. She testified that she knew the respondent well and that he was known as a honest and helpful man. Tr. at 426. She stated her belief that the executions in the Ancupani Hills were carried out by the German Security Police. She never heard that the respondent was in any way involved. Tr. at 428. She further stated that the public executions in the Rezekne market square were a warning by the Germans not to keep or hide guerrillas. Tr. at 430. The respondent admitted that she was not present when the Audrini villagers were arrested or shot, so she does not know for certain who did it. Tr. at 430-431.

Witness Marianna Dadzis testified that she met the respondent when he married her girlfriend in 1938, and that he later hired her as a clerk in the police office. Tr. at 433-436. She testified that the respondent usually dressed as a civilian, but also in an Aizsargi uniform, and that later he wore a German uniform. Tr. at 438. She stated that the respondent was always in the office. Tr. at 442. She stated that the respondent had many friends, and that she never heard of his involvement in the extermination of Jews or of his role in the Audrini village incident. Tr. at 442, 444. The witness testified that she does not know who killed the Audrini residents or who burned their village. Tr. at 446.

The final witness who testified regarding personal knowledge of the respondent in Latvia was Victoria Balodis. She testified that she met the respondent in 1938 and that they sang in the church choir together. Tr. at 447. She further testified that she and the respondent

lived on the same street during the German occupation so she saw him nearly every day. Tr. at 450. She stated that she knew he was doing police work, and, like the witness Dadzis, she said that the respondent often dressed as a civilian, but sometimes wore an Aizsargi uniform, and she later saw him in a German uniform. Tr. at 451. She testified that the respondent was respected in the town, that he was nice, gentle, and religious and that she knew of no involvement by the respondent in any atrocities. Tr. at 454-455.

Conclusions of Law

Based on the testimony and evidence described above, we conclude that the respondent is deportable under section 241(a)(19) of the Immigration and Nationality Act. That statute provides for the deportation of any alien who:

> during the period beginning on March 23, 1933, and ending on May 8, 1945, under the direction of, or in association with --
>
> (A) the Nazi government of Germany,
>
> (B) any government in any area occupied by the military forces of the Nazi government of Germany,
>
> (C) any government established with the assistance or cooperation of the Nazi government of Germany, or
>
> (D) any government which was an ally of the Nazi government of Germany,
>
> ordered, incited, assisted, or otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion.

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There is no dispute that the events in question here took place within the specified time frame. The first question, then, is whether the respondent in his role as Latvian Police Chief in the Second Police Precinct in Rezekne operated under the direction of, or in association with, the Nazi government of Germany, the government in a Nazi occupied area, or a government established with the assistance or cooperation of the Nazi government. Based on the evidence of record, as well as Board precedent and other case law, we find that he did.

As described above, the Government expert witness Wolfgang Scheffler testified that the German Nazi government exercised ultimate control over the indigenous police forces in Latvia. Documentary evidence of record fully corroborates this testimony. The Stahlecker Report, exhibit 24-1, details the Nazi policy of utilizing local police to aid them in their campaign to rid Latvia of Jews, Communists, and other "undesirables." Other evidence from the Nuremberg documents likewise describes this policy. Moreover, other documentary evidence involving the respondent specifically, such as exhibits 62, 83, and 84, reflects the role of the Second Police Precinct in Rezekne within this scheme. Finally, the respondent himself testified at trial that he received orders from Eichelis, who in turn received orders from the Germans. Tr. at 359, 365-367, 371-372.

In addition to the evidence and testimony provided in this case which indicates that the Latvian police in Rezekne operated under the direction of the Nazi government, case law also supports such a finding. In our decision in *Matter of Laipenieks*, Interim Decision 2949 (BIA 1983), we held that the Latvian Political Police operated under the direction of and in association with the Nazi government, and also that it constituted part of the government in Nazi-occupied Latvia. *Id.* at 30-31. Other judicial decisions have reached similar conclusions regarding indigenous police forces in the Baltic

states. *See e.g. United States v. Kowalchuk*, 571 F.Supp. 72 (E.D.Pa. 1983) (Nazis relied on help from indigenous police forces in the Ukraine); *United States v. Palciauskas*, 559 F. Supp. 1294 (M.D.Fla. 1983) (Germans exercised ultimate control over indigenous Lithuanian forces); *United States. v. Koziy*, 540 F.Supp. 25 (S.D.Fla. 1982), *aff'd* 728 F.2d 1314 (11th Cir. 1984) (indigenous police in the Ukraine were used by Germans to assist in most tasks); *United States v. Linnas*, 527 F.Supp. 426 (E.D.N.Y. 1981) (German Einsatzgruppen were aided in Estonia by indigenous forces); *United States v. Osidach*, 513 F.Supp. 51 (E.D.Pa. 1981) (Ukrainian police assisted the Germans in rounding up and otherwise persecuting Jews in the town of Rawa Ruska, in the Ukraine).

Based on the foregoing, we find that the police unit of which the respondent was chief operated under the direction of and in association with the Nazi government of Germany, and constituted a part of the government in Nazi-occupied Latvia.

We turn next to the question whether the respondent "ordered, incited, assisted, or otherwise participated in" the persecution of any person. Based on the respondent's own admissions and other evidence of record, we find that the respondent did assist in persecution. The respondent has now admitted that he participated in the arrests of all the inhabitants of Audrini, and that he subsequently ordered that the village be burned. The immigration judge characterized these actions as a "reprisal against the killing of one or more Latvian policemen." Decision at 18. He notes that these events "ultimately led to the Audrini massacre," but he said that the massacre "has not been shown to be predictable, planned or inevitable." *Id.* at 18. He therefore concludes that the Government had not proven that the respondent engaged in persecution. Other than simply calling the arrests and burning a "reprisal," the immigration judge does not explain why he does not consider those acts to

constitute persecution. In his brief on appeal, counsel for the respondent contends that the arrests and burning were a military necessity, similar to actions carried out by American soldiers in Vietnam. He argues that "there is nothing illegal or immoral about arresting villagers for the purpose of investigating and ascertaining the scope and nature of their activities so that proper preventive measures can be taken and the guilty ones who have been harboring guerrillas segregated from the innocent ones." Respondent's brief at 16. The Government, on the other hand, contends that the respondent's admitted actions constituted assistance to the enemy in persecuting civilian populations. The Government also argues that the acts constituted war crimes.

We agree with the Government's position that even on the facts admitted by the respondent and found by the immigration judge, the respondent engaged in persecution of civilian populations. While it may be true, as the respondent argues, that mass arrests and interrogations are sometimes necessary in time of war to prevent guerrilla activity, the actions admitted by the respondent went beyond that. Counsel suggests that the arrests were simply for the purpose of ascertaining which villagers were guilty of harboring Soviet partisans, and segregating them from the innocent villagers. No evidence has been presented as to how long the villagers were held and interrogated, and under what conditions. However, we know that the homes of all the villagers, innocent and "guilty," were burned. The burning of the entire village of Audrini hardly served the claimed purpose of ferreting out and punishing only the guilty villagers. In our view, the arrests of every inhabitant closely followed by the burning of their village constituted persecution of the civilian population. We note that the respondent in his brief contends that "[t]he government has not established that the villagers were innocent." Respondent's brief at 15. We do not believe that

the Government was required to prove that some of the villagers were innocent. Rather, we think it fair to assume, absent evidence to the contrary, that not every man, woman, and child in Audrini assisted Soviet partisans.

In *Matter of Laipenieks, supra,* we held that where persons were arrested, interrogated, incarcerated, deprived of their liberty, and frequently beaten with hands or clubs, such treatment constituted persecution within the meaning of section 241(a)(19) of the Act. *Id.* at 34-35. In the present case (even leaving out consideration of the villagers' ultimate fate), every inhabitant of the village of Audrini was arrested, and their village was burned. This, too, constituted persecution. In *Laipenieks,* we quoted from the legislative history of the so-called "Holtzman Amendment" (Pub. L. 95-549, 92 Stat. 2065), of which section 241(a)(19) is a part. The legislative history reveals that Congress found it unnecessary to set forth a statutory definition of "persecution." General Congressional intent, however, is reflected in that history. The Congressional report, H.R. Rep. No. 95-1452, 95th Cong., 2d Sess. 3, reprinted in 1978 *U.S. Code Cong. & Ad. News* 4700, notes that case law had fashioned workable definitions of persecution without the aid of a statutory definition, and states:

> Generally this case law has described persecution as the infliction of suffering or harm, under government sanction, upon persons who differ in a way regarded as offensive (e.g., race, religion, political opinion, etc.), in a manner condemned by civilized governments. The harm or suffering need not [only] be physical, but may take other forms, such as the deliberate imposition of *severe economic disadvantage* or the *deprivation of* liberty, food, *housing,* employment *or other essentials of life.* (Emphasis added.)

Id. at 4704. Clearly, then, Congress contemplated that deprivation of housing could constitute persecution. The burning of Audrini not only deprived its inhabitants of housing, but also would have imposed upon them severe economic disadvantage and the loss of other essentials of life.

In enacting the "Holtzman Amendment," the Congress made clear that reference to "international material," including opinions of the Nuremberg tribunals, was also appropriate in making individual determinations regarding persecution.[15] The Charter of the Nuremberg International Military Tribunal included within the definition of war crimes the "wanton destruction of cities, towns or villages, or devastation not justified by military necessity." Article 50 of the Hague Regulations states: "[n]o general penalty, pecuniary or otherwise, shall be inflicted on account of the acts of individuals for which they cannot be regarded as jointly and severally responsible." The burning of Audrini was clearly the kind of wanton destruction and general penalty contemplated by these and other documents.

Our finding that the arrests of the inhabitants of Audrini and the burning of that village constituted persecution is further supported by the case law. In *United States v. Dercacz*, 530 F.Supp. 1348 (E.D.N.Y. 1982), for example, the court granted summary judgment for the Government in a case involving an Ukrainian policeman who as part of his duties reported Jews who

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[15] The report states:

> In applying the "persecution" provisions of the bill, it is the intention of the committee that determination be made on a case-by-case basis in accordance with the case law that has developed under the INA sections heretofore cited, as well as international material on the subject such as the opinions of the Nuremberg tribunals.

Id. at 4706.

failed to wear the required armbands and those who sold food to Jews. The court found that in so doing, the respondent assisted the Nazis in persecuting civilians within the meaning of the I.R.O. Constitution and section 2 of the Displaced Persons Act. In *United States v. Kowalchuk, supra*, the court found assistance to the Nazis in persecuting civilians where the respondent occupied a responsible, but largely clerical, position in the Ukrainian militia. The court noted that the respondent may not have actually been personally involved in any atrocities, but he "must have known of the harsh repressive measures which the schutzmannschatten were carrying out pursuant to German direction." *Id.* at 81. In *United States v. Osidach, supra*, the court held that a Ukrainian policeman, while not proved to have actually engaged in persecution himself, had assisted in persecution by virtue of his membership in the Ukrainian police. It is obvious that the role played by the respondent in the Audrini incident alone was more clearly assistance in persecution than the actions taken by the respondents in these cases.

After consideration of all the testimony and evidence, as well as the case law and the legislative history of section 241(a)(19), we have no trouble in concluding that the respondent assisted in the persecution of civilian populations in Latvia. The respondent's attempted analogy to American actions in Vietnam does not persuade us that the burning of Audrini and the arrests of all its inhabitants was a military necessity, and not persecution. Furthermore, the fact that he may have been acting on orders from his Latvian and German supervisors is not a defense. *See Fedorenko v. United States*, 449 U.S. 490 (1981).

The final issue to be resolved in determining whether the respondent is deportable under section 241(a)(19) is whether the persecution he assisted in was "because of race, religion, national origin, or political opinion." The

inhabitants of Audrini, who were Latvian, and whose faith was apparently Orthodox (Tr. at 363), were persecuted because Soviet partisans had been found hiding in the village. As a result of the fact that some of the villagers were apparently sympathetic to the Soviet cause, all were arrested, and eventually killed, and the village was burned. The dragnet was large, and no doubt encompassed some who were not sympathetic to the Communists, and who in fact may have held no political views at all. Nevertheless, the actions carried out against the Audrini villagers were initiated because of the political opinions held by some of the inhabitants. Under these circumstances, we have no difficulty in concluding that the persecution in which the respondent assisted was based on political opinion and comes within the meaning of section 241(a)(19).[16]

In view of all the foregoing, we find, by clear, unequivocal, and convincing evidence that the respondent, under the direction of, and in association with, the Nazi German government, assisted and otherwise participated in the persecution of persons because of political opinion. Therefore, the respondent is deportable under section 241(a)(19) of the Act, and the sixth charge made against the respondent is sustained.

MISREPRESENTATION CHARGES
Legal Standards

We turn next to the question whether the respondent is deportable based on the admitted misrepresentations he made in applying to immigrate to the United States. The first, second and fourth charges of deportability are based on those misrepresentations. We begin with the

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[16] In *Matter of Laipenieks, supra*, we specifically rejected the argument (not made here) that Communism is not an included form of "political opinion under the Holtzmann Amendment." *Id.* at 39-41.

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premise that the respondent is deportable based on his misrepresentations only if those misrepresentations were material. *See Fedorenko v. United States, id.* at 508. Hence, the question is, was it a material misrepresentation for the respondent to claim he was a bookkeeper during World War II when in fact he was the chief of police in a small precinct in Rezekne, Latvia?

In his decision, the immigration judge applied this test for determining whether or not a misrepresentation made in a visa application is material: "The Government must establish not only a misrepresentation which cut off a relevant line of inquiry but one which would have led to a proper determination that he was ineligible for a visa." Decision at 17. The immigration judge found that the Government had not met its burden: he concluded that the respondent would have been allowed to enter the United States even if he had revealed his true employment.

The immigration judge cited no authority for the test of materiality which he applied in this case. In fact, the question of what constitutes a material misrepresentation has been the subject of considerable litigation, and the issue has not yet been finally resolved. In a denaturalization case, *Chaunt v. United States*, 364 U.S. 350 (1960), the Supreme Court held that a misrepresentation made on a citizenship application is material if either facts were suppressed which, if known, would have warranted denial of citizenship, or if "their disclosure might have been useful in investigation possibly leading to the discovery of other facts warranting denial of citizenship." *Id.* at 355. In a more recent case involving a man who was an armed guard at the notorious death camp Treblinka during World War II, *Fedorenko v. United States, supra*, the court held that Fedorenko's failure to disclose such employment on his visa application was a material misrepresentation and that his visa had thus been illegally procured. In reaching this

conclusion, however, the court distinguished *Chaunt*, *supra*, on the ground that in *Chaunt* the misrepresentation was made in a citizenship application, whereas in *Fedorenko*, the misrepresentation was made in the visa application. Because the court found that disclosure of the true facts about Fedorenko's service as an armed guard at Treblinka would, in and of itself, have made him ineligible for a visa under the Displaced Persons Act as a matter of law, they found it unnecessary to decide whether *Chaunt*'s two part materiality test would govern false statements in visa applications as well as in citizenship applications.

Moreover, as the concurring and dissenting opinions in *Fedorenko* make clear, *Chaunt*'s materiality test is subject to wide interpretation. Justice Blackmun in a concurring opinion stated his view that under either *Chaunt* test, "the Government's task is the same: it must prove the existence of disqualifying facts, not simply facts that might lead to hypothesized disqualifying facts." *Fedorenko* at 523-524. Justice White, dissenting, expressed the opinion that it is sufficient under *Chaunt* for the Government to prove "only that such an investigation *might have* led to the discovery of facts justifying denial of citizenship." *Id.* at 529. (Emphasis in original.) Finally, Justice Stevens, dissenting on different grounds, expressed his opinion that *Chaunt* really involved three inquiries, not two. He stated and explained these tests as follows:

> (1) whether a truthful answer would have led to an investigation, (2) whether a disqualifying circumstance actually existed, and (3) whether it would have been discovered by the investigation. Regardless of whether the misstatement was made on an application for a visa or for citizenship, in my opinion the proper analysis should focus on the first and second components and

> attach little or no weight to the third. Unless the Government can prove the existence of a circumstance that would have disqualified the applicant, I do not believe that citizenship should be revoked on the basis of speculation about what might have been discovered if an investigation had been initiated. But if the Government can establish the existence of a disqualifying fact, I would consider a willful misstatement material if it were more probable than not that a truthful answer would have prompted more inquiry.

Lower court decisions which have attempted to apply *Chaunt* have also reflected confusion as to its meaning. Cases which suggest that a misrepresentation is material if knowledge of the true facts *might* have led to the discovery of facts warranting denial of a visa or of citizenship include *Kassab v. INS*, 364 F.2d 806 (6th Cir. 1966); *United States v. D'Agostino*, 338 F.2d 490 (2d Cir. 1964) (the present case arises in the Second Circuit); *Langhammer v. Hamilton*, 295 F.2d 642 (1st Cir. 1961); *United States v. Kowalchuk, supra; United States v. Schellong*, 547 F.Supp. 569 (N.D.Illinois 1982), *aff'd* 717 F.2d 329 (7th Cir. 1983), *cert. denied*, ____ U.S. ____, 104 S.Ct. 1022 (1984); and *United States v. Koziy, supra*. Other cases have required a finding that knowledge of the true facts would have led to outright denial of a visa or citizenship, or have cited *Chaunt* but found it unnecessary to go beyond the first prong of the test set forth there. *See e.g. United States v. Sheshtawy*, 714 F.2d 1038 (10th Cir. 1983); *La Madrid-Peraza v. INS*, 492 F.2d 1297 (9th Cir. 1974); *United States v. Riela*, 337 F.2d 986 (3rd Cir. 1964); *United States v. Rossi*, 299 F.2d 650 (9th Cir. 1962); *United States v. Kungys*, 571 F.Supp. 1104 (D. N.J. 1983); *United States v. Linnas, supra; United States v. Demjanjuk*, 518 F.Supp. 1362 (N.D.Ohio 1981), *aff'd* 680 F.2d 32 (6th Cir. 1982).

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The Attorney General has also enunciated a rule of materiality regarding misrepresentations made in connection with applications for visas. In *Matter of S-& B-C*, 9 I&N Dec. 436 (A.G. 1961), the Attorney General held that a misrepresentation is material if either "(1) the alien is excludable on the true facts, or (2) the misrepresentation tends to shut off a line of inquiry which is relevant to the alien's eligibility and which might well have resulted in a proper determination that he be excluded." In a more recent decision, *Matter of Bosuego*, 17 I&N Dec. 125 (BIA 1979, 1980), this Board refined *Matter of S-& B-C-, supra*. We held that where it is not shown that an alien would have been excludable on the true facts, then the Government must "show facts possibly justifying denial of a visa or admission to the United States would have likely been uncovered and considered but for the misrepresentation." If the Government is able to make this showing, then the burden of proof shifts to the alien to establish that "no proper determination of inadmissibility could have been made."

EVIDENCE PRESENTED

It is in the contexts of all these cases that the materiality of the respondent's admitted misrepresentations must be considered. A number of witnesses testified at the hearing regarding the effect the misrepresentation made by the respondent would have had on his admissibility. Rosemary A. Carmody, who in 1951 was a Foreign Service vice consul processing people under the Displaced Persons Act in Hamburg, Wenthoff, Germany, was the first such witness. Carmody identified her signature on Exhibit 38, the respondent's application for an immigrant visa. Tr. at 242. The witness testified that had that application revealed that the respondent was a police chief in Rezekne, he would have been per se ineligible for displaced persons status and she would

have denied the visa. Tr. at 250. According to Carmody, such a person "invariably" would have been involved in some collaboration with the Nazis, and an alien who made such a misrepresentation would have been ineligible as a matter of law. Tr. at 250-253. Carmody also testified that the respondent's application was processed near the end of the displaced persons program when she and other officials were working 14 hour days, 7 days a week in order to use up all the allocated visas before the program expired on December 31, 1951. Tr. at 254-256.

The next witness called by the Government was Abraham P. Conan, who worked for the Displaced Persons Commission in Hamburg from July, 1950 to February, 1951, as the senior officer in charge of the British zone of Germany. Tr. at 264. All applications for displaced persons status which were rejected were referred to him for review. Tr. at 265-266. Like Carmody, Conan testified that the respondent would have been ineligible as a displaced person if he had revealed the true facts of his employment during World War II. Tr. at 290. The witness states that he knew of no case where Latvian policemen had admitted such employment and obtained a visa. Tr. at 296-297.

Conan also testified regarding the so called inimical list. He stated that this was a document used by the Displaced Persons Commission which listed foreign organizations or movements deemed inimical to the United States. According to Conan, any member of an organization or movement named on the list "was deemed ineligible for admission to the United States and would be rejected, his application would be rejected." Tr. at 286. The original inimical list as well as a revised version and a list of deletions from the list were identified by Conan, and were placed into evidence as exhibits 75 through 77. These exhibits reflect that the Aizsargi was

originally on the list, but was later deleted.[17] The exhibits also reflect that the organization Schutzmannschaften was always on the inimical list. Conan testified that the term Schutzmannschaften "would include the police forces, the local police," and specifically stated that the term would cover the Latvian auxiliary police in Rezekne. Tr. at 291. On cross-examination, however, Conan stated that while not every single policeman in Latvian would necessarily be considered a member of the Schutzmannschaften, the burden would be on the applicant to show that he was not. Tr. at 293-294.

A third Government witness, who testified as to these matters during the Government's rebuttal, was Gerard F. Charig. Charig was with the Displaced Persons Commission in Frankfurt, Germany from July of 1950 to March of 1952. He was a member of the three member (with one alternate) review panel which reviewed denials of displaced person applications. The decisions of the review panel were final. Tr. at 727. Charig testified that it was "unequivocally a material misrepresentation" for the respondent to say on his visa application that he was a bookkeeper when in fact he was a member of the Latvian Police. Tr. at 757-758.

Like Conan, Charig testified regarding the inimical list, and stated that membership in a listed organization would result in denial of an application for displaced person status. Tr. at 737-738. When asked how the review panel interpreted the term "Latvian Schutzmannschaften," Charig replied "[t]he review panel interpreted that as all Latvian police, all Latvian police." Tr. at 744. *See*

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[17] The respondent's application for displaced person status was in fact initially denied because of his admitted membership in the Aizsargi. Exhs. 70-71. However, when the Aizsargi was later deleted from the inimical list, the respondent's application was approved. Exh. 74.

also Tr. at 755. The witness did state that it was possible for a Latvian policeman to "exculpate himself" if he could show that he was conscripted and did not commit atrocities or persecute civilians. Tr. at 745. The witness also testified that mistakes were sometimes made in processing the applications and that the expedited processing toward the end of the program increased the possibility of error. Tr. at 760-762.

On cross-examination by counsel for the respondent, Charig reiterated that the Latvian police and other police organizations were considered part of the Schutzmannschaften (Tr. at 786-787), and he stated that the Schutzmannschaften was included on the inimical list because the Latvian police "were part and parcel of the German occupation force [and] collaborated with the Germans." Tr. at 781. He testified that he came to the conclusion that all Latvian policemen were members of the Schutzmannschaften through the training he received and through "the consistent decisions from the beginning to the end until I left." Tr. at 786. He stated that the decisions on this issue were precedents and had to be followed. Tr. at 786.

The respondent's primary witness on the issue of Displaced Persons Commission procedures was Melbourne Hartman. Hartman worked as an investigator for the Displaced Persons Commission in Hamburg from mid-1949 to December, 1950. His job was to investigate whether or not an applicant was a member of a movement hostile to the United States or to our form of government. He testified that the overall chief of the Hamburg office was the Government witness Conan. Hartman strongly disagreed with both Conan's and Carmody's testimony that mere membership in the Latvian police would per se result in denial of displaced person status. Tr. at 552-553. He stated that he personally processed numerous applicants who admitted they were police, and he certified that these people "met the

requirements of the securities section" (section 13 of the Displaced Persons Act). Tr. at 553. He also stated that he knew of people who disclosed their police service during the German occupation of Latvia, and were admitted to the United States, including the head of the Latvian police, a man named Pommers. Tr. at 578. He testified that he had never heard of the inimical list, though he noted that that document was classified "Secret" and no investigator for the Displaced Persons Commission had clearance to handle secret documents. Tr. at 561-562. He further testified that he totally disagreed with Conan's opinion that all policemen were part of the Schutzmannschaften. Tr. at 569-572. He also stated that Conan was an administrator with "no substantive knowledge," and he often had to explain details to Conan. Tr. at 569.

During his testimony, Hartman emphasized that the displaced persons were a burden to the German authorities and the British Government, and there was great pressure to relocate them. Tr. at 554-555. He testified that therefore "[y]ou took a quick look" at most cases, and went ahead and certified, because there simply was not time to "dilly dally with individual cases because some minor question mark appeared in somebody's mind." Tr. at 556-557.

On cross-examination, Hartman stated that the Germans would have made, or at least approved, all chief of police appointments in Latvia, but he stated that "these were pro forma appointments" and did not constitute anything "sinister or serious." Tr. at 618. He reiterated that the term Schutzmannschaften did not include all Latvian police, and he stated his view that the Displaced Persons Commission did not so consider it. Tr. at 619-625. He further testified that during his tenure, membership in the Schutzmannschaften did not per se warrant denial of displaced person status in any event. Tr. at 625.

Hartman testified on cross-examination that if an applicant initially lied on his application for displaced person status, but later recanted and told the truth, he could have his application approved as long as he had not persecuted people. Tr. at 638-641. However, if he never revealed the true facts, and the Displaced Persons Commission learned of them, his application would be denied. Tr. at 639, 642-643. When specifically asked whether he would have permitted a person who said he was a farmer when in fact he was a Latvian police chief to come to this country if he never told the truth, Hartman replied that he would not. Tr. at 643.

The second witness called by the respondent to testify regarding Displaced Persons Commission procedures was Earnest R. Acker, Jr. He testified that he was a "selector" for the Displaced Persons Commission in Hamburg from June, 1949 to August, 1950, and that his job was to gather together and select documents, such as birth and marriage certificates, relevant to an individual's immigration to the United States. Tr. at 646, 653. When asked for his recollection as to the eligibility of policemen to enter the United States under the Displaced Persons Act, the witness answered, "[a]s far as I know they were eligible unless there was some other damaging evidence against them." Tr. at 647. When confronted with the inimical list on cross-examination, Acker stated that he had never seen the document before. Tr. at 652. He stated that he had heard the term Schutzmannschaften, but had forgotten its meaning. Tr. at 652. Acker testified that he was not involved in making actual determinations as to eligibility, but that if he saw documents which suggested possible ineligibility, the case would go to investigations, or to the person who made the final determinations. Tr. at 653-654.

The final witness called by the respondent on this issue was Gunars Meierovics. Meierovics testified that he was a camp commandant at the British zone resettle-

ment center at Wenthoff, and was himself a displaced person there. Tr. at 661. He stated that one of the main fears of those in the camps was forced return to Soviet-occupied Latvia. Tr. at 666. He also testified that many people failed to disclose their military or police service because it was so easy: "they just asked questions and whatever you said, it went on a form and that's the way it was." Tr. at 666-667. Meierovics stated his understanding that the term Schutzmannschaften was not applied to local police in Latvia and he further stated that there was no prohibition against members of the Schutzmannschaften coming to the United States. Tr. at 672.

On cross-examination, Meierovics testified that he knew that the Latvians sometimes assisted the Germans in killing civilians. Tr. at 678. He admitted that he did not know what the Displaced Persons Commission meant when they used the term Schutzmannschaften. Tr. at 680. He testified that he had never heard of the inimical list. Tr. at 680-681. He stated that the Latvian auxiliary police did not collaborate with the Nazis during the war, but then agreed that if the Germans gave an order to a local police chief which he was obliged to carry out, that would be assisting the Nazis. Tr. at 684. The witness conceded that one of the things the Displaced Persons Commission was interested in was a person's activities during the war, but he added "as far as I know, they had very little material information to go with." Tr. at 683.

Further evidence was offered by the respondent on this issue after the hearing, with the submission of exhibit 123, the March 29, 1982, deposition of Robert G. Printz. Printz was an investigator/security agent for the Displaced Persons Commission in Hamburg from January of 1949 to 1952. In that capacity he conducted investigations into the backgrounds of applicants for displaced persons status. Exh. 123 at 7-8. Printz stated that to the best of his recollection, policemen were not

per se ineligible to come to the United States. *Id.* at 16-17. However, he also stated that if an application revealed employment as a policeman. "I would have to ascertain how long he had been a policeman, what his position in the police department was, whether he was privy to any of the directions of the police department; or whether he was just an order follower. In other words, a traffic policeman, patrol, beat patrol policeman." *Id.* at 18. On cross-examination, Printz elaborated on this point, stating that if an applicant admitted to police service, he was likely to be interviewed as many as three or four times to determine whether he had taken part in any persecution. *Id.* at 27-28. Further outside investigation would also have been conducted. *Id.* at 29. Asked what he would have done if an applicant was a chief of a police unit that participated in burning an entire village and arresting all the inhabitants, and if he ordered his men to assemble at the village prior to the burning, he stated that he did not believe he would have approved the application. *Id.* at 33.

Another post-trial exhibit relating to the effect the respondent's misrepresentations would have had on his visa application was exhibit 125, which was also offered by the respondent. This exhibit consists of the April 6, 1982, deposition of Brigitta Borchers. Borchers testified that she worked for the Displaced Persons Commission in Hamburg under the s ıpervision of Robert G. Printz. Exh. 125 at 3. Her job was basically that of a secretary and interpreter. She had no authority to make eligibility determinations, but she stated that her job was "to find out the flaws in the application" (for displaced person status). *Id.* at 25. Borchers testified that there was a temporary hold placed on applications where membership in the Latvian Legion was revealed, but the hold was later rescinded and the Legionnaires had their applications approved. *Id.* at 15. She stated that as far as she knew there was never a hold placed on policemen as

such, and they were processed and allowed to come to the United States. *Id.* at 16-18. Borchers stated that she had never heard of the inimical list. *Id.* at 18-19. On cross-examination, the witness stated that if an applicant admitted that he was a policeman, further investigation would have been conducted. Tr. at 32-35.

In addition to the witnesses and depositions, both parties also presented documentary evidence on the misrepresentation issue. The Government offered as exhibits 10 memoranda and notices of rejections under the Displaced Persons Act (Exhs. 99-108). These Exhibits reflected that the applicants were found ineligible for displaced person status because of their membership (or in one case the applicant's husband's membership) in, variously, the "Latvian Schutzmannschaft" (Exh. 99), the " 'Schutzmannschaft' (Latvian Police)" (Exh. 100), the "'Schutzmannschatt' at Riga, Latvia" (Exh. 101), the "Latvian Police" (Exhs. 102, 104); the "Hilfspolizei" in Riga, Latvia (Exh. 103), the "Schutzmannschaft" (Exh. 105), the "Latvian Political Police" (Exh. 106), the "Lithuanian Schutzmannschaften" (Exh. 107), and the "Galician Waffen SS" (Exh. 108). The applications shown in Exhibits 99-107 were all rejected under section 13 of the DPA, as the organizations named were said to be movements hostile to the United States or our form of government. The application found in Exhibit 108 was rejected under section 10 of the DPA: the applicant had concealed his membership in the Galician Waffen SS, and was found ineligible for that misrepresentation, even though the Galician Waffen SS had been removed from the list of hostile movements. These documents were offered to prove that police in Latvia and the other Baltic states were found ineligible for displaced person status, and that the respondent, too, would have been found ineligible had he revealed his employment with the Rezekne police.

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The respondent offered other documentary evidence to establish that, on the contrary, Latvian policemen were not per se ineligible and in fact were allowed to immigrate to this country even after revealing such employment. Exhibit 132 includes various documents relating to the immigration of one Elmars Sprogis. The documents reflect that Sprogis stated on his Application for I.R.O. Assistance that he had been employed as the Chief of Police in Madona, Latvia, from July, 1941 to August, 1944. The Displaced Persons Commission Report mentions this employment, yet concludes that Sprogis is an eligible displaced person.

Exhibit 113 is an October 19, 1981 letter to the respondent's counsel from the Assistant Deputy of the Justice Department's Office of Special Investigations. The letter reflects that the Displaced Persons Commission Report on Peter Vilhelm Celms stated the Celms was "chief of the order police at various places in Latvia" from July, 1941, to July, 1944. Exhibits 109 and 110 further reflect Celms employment as a police chief. Celms was approved for displaced person status and was admitted to the United States.

The Government asserts that Sprogis and Celms were admitted to the United States mistakenly, or, possibly, were able to show that they were conscripted and did not persecute. Government Response Brief at 9-10. *See also* testimony of Government witness Charig at 760-762. The respondent in his reply brief argues that the Government failed to show that these Latvian policemen were admitted by mistake. Respondent's Reply Brief at 3-4.

Conclusions of Law

We find that the misrepresentations made by the respondent in order to gain admission to the United States were material, and thus render him deportable.

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All of the witnesses who testified or gave depositions regarding Displaced Persons Commission procedures, including the respondent's witnesses, stated that, at the very least, further inquiry would have been made if the respondent had revealed that he was the police chief of the Second Precinct in Rezekne during World War II. It is fair to assume that further inquiry would have led the discovery of other true facts, including disclosure of the respondent's role in the fate of Audrini, a village within his precinct, and its inhabitants. As we have found that the respondent's participation in the arrests of the Audrini villagers, and the burning of the village itself constituted persecution, we find that disclosure of such participation would have led to outright denial of displaced person status, and, hence, of a visa. As pointed out previously, a person who engaged in persecution was, per se, ineligible for I.R.O. assistance and for displaced person status. Hence, had the true facts been known, the respondent would not have obtained his visa. Regardless of what standard of materiality is applied, then, the respondent's misrepresentations were material. We therefore find that the first, second and fourth charges of deportability were sustained.

We further find that even if we had concluded that the respondent's admitted actions did not constitute persecution, he would still be deportable on grounds of material misrepresentation. As discussed above, the respondent's concealment of his true employment cut off a relevant line of inquiry. Inquiry would likely have uncovered "facts possibly justifying denial of a visa or admission to the United States." *Matter of Bosuego, supra*. Under *Bosuego*, the respondent then had to prove that "no proper determination of inadmissibility could have been made." Given the respondent's admitted activities as a Latvian police chief, we find that the respondent has not and could not make such a showing. In reaching this conclusion we reaffirm the rules set

forth in *Matter of Bosuego, id.*, and in *Matter of S- and B-C, supra.* The Supreme Court has not yet established a rule of materiality in any way inconsistent with those decisions, and recent decisions on the issue from lower federal courts which suggest other possible tests (cited above) have not persuaded us to reconsider the rules set forth by the Attorney General and this Board. Moreover, we know of no case where a court has held that concealment of employment as a policeman, or similar employment, in the Baltic states during World War II was not a material misrepresentation regardless of the test of materiality applied. *See e.g. Fedorenko v. United States, supra* (statement that applicant was government clerk when in fact was member of Ukrainian militia was material misrepresentation); *United States v. Palciauskas, supra* (material misrepresentation to state was store clerk when in fact was mayor of town in Lithuania); *United States v. Koziy, supra* (material misrepresentation to claim employment as tailor when in fact was member of organization of Ukrainian Nationalists and of Ukrainian Police); *United States v. Dercacz, supra* (statement that he was dairy farmer when in fact was member of Ukrainian police was material misrepresentation); *United States v. Linnas, supra* (material misrepresentation to claim was student when in fact was chief of concentration camp, and member of Home Guard in Estonia).

We note that when asked at the hearing why he did not reveal his police employment when seeking displaced person status, the respondent replied, "I was never asked for it," and "they didn't ask me." Tr. at 379. We find these statements to be totally incredible since the Application for I.R.O. Assistance, which the respondent completed in December of 1949, specifically asked for his employment over the last 10 years (Exh. 40). In addition, other entry documents reflect that the respondent was a bookkeeper during most of the war years; the information for these documents was persumably provided by the respondent.

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On appeal, it is also claimed that the respondent did not reveal his police employment because he feared forced repatriation to the Soviet Union. Respondent's brief at 19. At least two courts have specifically rejected this defense, the Fifth Circuit in *United States v. Fedorenko*, 597 F.2d 946, 953 (5th Cir. 1979), and the United States District Court for the Northern District of Ohio in *United States v. Demjanjuk, supra*, at 1382. The Fifth Circuit in its decision in *Fedorenko* stated that

> it is irrelevant whether the defendant perpetrated the fraud to avoid repatriation to Russia, as he also has asserted, since the immigration law does not allow a defense that a material misrepresentation was motivated by fear of what might have resulted if the applicant had told the truth. See 8 U.S.C. § 1451(a).

Id. at 953.

The Supreme Court in affirming the Fifth Circuit in *Fedorenko* did not directly address this issue, but did indicate that it would not allow such a claim, even if proven, to be a defense against a misrepresentation charge. The Court, at n. 26, stated, "[t]hat respondent gave these false statements because he was motivated by fear of repatriation to the Soviet Union indicates that he understood that disclosing the truth would have affected his chances of being admitted to the United States and confirm that his misrepresentation was willful." We also reject this defense, while noting as well that the respondent has not established such a motivation for making his misrepresentation in any event.

THE HAZNERS, DETLAVS AND KUNGYS DECISIONS

Counsel for the respondent asserts that the instant case is very much like two "companion" cases involving alleged Nazi war criminals, where this Board found that

the Government had failed to sustain its burden of proof. The Government argues that the two cases, *Matter of Hazners*, A10 305 336 (July 15, 1981, unpublished), and *Matter of Detlavs*, A7 925 159 (October 15, 1981, unpublished), are distinguishable from the case now before us. We agree with the Government's position. While it is true that there were some common issues of fact and law in the three cases, and the cases shared some common witnesses, we agree with the Government that there are crucial differences between this case and *Hazners* and *Detlavs*.

In *Hazners*, the respondent was charged with deportability as an alien excludable at entry for having advocated or assisted in persecution. No charges were made regarding possible misrepresentations on entry documents or regarding membership in a hostile movement or an organization that engaged in persecution. The allegations to support the persecution charge were based only on incidents in Riga and Dwinsk, Latvia, in which the respondent was alleged to have taken part in arresting Jews who were then subjected to assaults, beatings, and other indignities, and in forcing Jews into a ghetto. Those allegations in turn were supported solely by witnesses whose testimony and identifications were weak and often conflicting. On those facts, we found the charge of persecution not to have been sustained.

In *Detlavs*, the respondent admitted that he had been a member of the Latvian Legion during World War II, and that he did not disclose this association when applying to immigrate to the United States. Noting that the Government had introduced only very limited evidence regarding the effect of this misrepresentation, and that the respondent's witness had testified that disclosure of such membership would not have affected his application for displaced person status, we concluded it was far from clear that the respondent was not qualified for entry based on the true facts. We therefore held that the

Government had not proven that the respondent was deportable on the basis of a material misrepresentation. We also found that the Government had failed to sustain its burden of proving that the respondent was a member of the Latvian security police and that he persecuted Jews in the Riga ghetto. As in *Hazners*, we found that the testimony and identifications offered to support the persecution charges were conflicting and unconvincing.

In the present case, on the other hand, the respondent has admitted membership not in the Latvian Legion, which, it is clear, would have barred his admission,[18] but in the Latvian police. He has admitted that in his capacity as a Latvian police chief he participated in acts which we find to constitute persecution. Unlike *Hazners* and *Detlavs*, where the Government had to rely for its cases almost entirely on witnesses whose testimony was found to be unreliable, we are basing our findings on the respondent's own admissions and testimony, supported by other reliable documentary evidence and testimony. We note also that in the *Hazners* case, the Government failed to make any allegations or charges relating to misrepresentation or membership in a proscribed organization. The present case suffers from no such infirmities.

We also find the case of *United States v. Kungys*, *supra*, relied upon by the respondent, to be wholly distinguishable from the present case. In *Kungys*, the respondent admitted that in seeking to immigrate, he misrepresented the date and place of his birth, and failed to disclose that he had been employed as a bookkeeper-clerk in Kaunas, Lithuania from 1941-1944, stating

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[18] Although there was apparently a temporary "hold" placed on applicants for displaced person status who had been members of the Latvian Legion, such applicants were not actually denied status as displaced persons, and eventually the hold was lifted and such persons were allowed to immigrate, *See e.g.* Tr. at 575-576.

instead that he had lived part of that time in Telsiai, Lithuania, and had been employed as a student, dental technician, and farm and forest worker. The court found that these misrepresentations were not material under any test of materiality. It concluded that the Government had failed to prove even that further investigation would have been conducted had the respondent revealed the true facts of his birthdate and place, his residence, and his employment. The court further found that the Government had failed to prove that the respondent had engaged in persecution, emphasizing that proof of such facts depended largely on Soviet depositions, which the court found to be unreliable as to the respondent's alleged participation in atrocities.

In *Kungys, id.*, there was no showing that the respondent was a Lithuanian policeman during the war, while in the present case Maikovskis now admits he was a Latvian policeman, and all of the evidence, without exception, shows that disclosure of that fact would have led at least to further investigation. Nor was there sufficient proof that Kungys engaged in persecution, while we have found that certain acts Maikovskis admits to committing constituted persecution.

We note also that much of the *Kungys* decision relates to the weight to be given to depositions taken in Lithuania. Inasmuch as we have not relied in any way on the depositions taken in Latvia, that portion of the *Kungys* decision is simply not relevant to our disposition of this case.

RELIEF FROM DEPORTATION

In the event that he should be found deportable, the respondent made applications for various forms of relief from deportation. He first sought a waiver of deportability under section 241(f) of the Act, 8 U.S.C. 1251(f). However, the respondent in the August 2, 1982, memo-

randum on discretionary relief filed with the immigration judge, conceded that he would not be eligible for this relief if the Government "sustained its burden of proof on the war crimes, persecution and hostile movement theories." *Id.* at 2. As we have found the respondent deportable on the ground that he engaged in persecution, he is not "otherwise admissible," and is thus ineligible for a section 241(f) waiver. Moreover, under the 1981 amendments to the Immigration and Nationality Act, aliens who are deportable under section 241(a)(19) are specifically barred from obtaining section 241(f) relief. Immigration and Nationality Act Amendments of 1981, Pub. L. 97-116, § 8, 95 Stat. 1611.[19]

In addition to section 241(f) relief, the respondent has also sought asylum and withholding of deportation, suspension of deportation, or, alternatively, voluntary departure. By virtue of our finding that the respondent assisted in persecution, he is statutorily ineligible for all these forms of relief. In order to qualify for asylum under section 208 of the Act, 8 U.S.C. 1158, the respondent must establish that he is a refugee within the meaning of section 101(a)(42)(A) of the Act, 8 U.S.C. 1101(a)(42)(A). Section 101(a)(42)(A) specifically excludes from the definition of refugee "any person who ordered, incited, assisted or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion." Similarly, an alien is barred from obtaining withholding of deportation if he engaged in such acts. Section 243(h)(2)(A) of the Act, 8 U.S.C. 1253(h)(2)(A). Section 244(a) of the Act, 8 U.S.C. 1254(a), as amended

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[19] The respondent argues that the 1981 Amendments should not apply to him because to do so would reward the Government for proceedings so slowly in this case. We reject this contention. Although this case has dragged on for a long time, we find no undue delay on the part of the Government.

by Pub. L. 97-116, § 18(h)(2), 95 Stat. 1611 (1981), precludes granting suspension of deportation to aliens, like the respondent, who are deportable under section 241(a)(19). Section 244(e), contains a similar bar to voluntary departure. *See also Matter of Fedorenko,* Interim Decision 2963 (BIA 1984); *Matter of Laipenieks, supra.*

As we find that the respondent is statutorily ineligible for relief from deportation, his applications for such relief are denied.

CONCLUSION

We have found, by clear, unequivocal, and convincing evidence, that the respondent is deportable on four separate grounds because he assisted in the persecution of persons based on their political opinion, and because his immigrant visa was procured by willful misrepresentation of material facts. These findings make it unnecessary to address the remaining theee charges of deportability, and the arguments surrounding them.[20] As the immigration judge ordered these proceedings terminated, and we have found the respondent to be ineligible for any form of relief from deportation, the immigration judge's order will be vacated, and the Government's appeal based on the first, second, fourth, and sixth charges of deportability will be sustained.

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[20] Among the issues we find it unnecessary to decide today are whether the respondent engaged or assisted in persecution based on race, religion, or national origin, whether or not all Latvian policemen were pre se excludable, whether or not the Latvian police in general or the Latvian police in the Second Precinct in Rezekne constituted a movement hostile to the United States or our form of government, and whether the Order to Show Cause was sufficient regarding the charge of membership in a hostile movement.

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The respondent at his hearing designated Switzerland as the country of deportation should he be ordered deported. Tr. at 829. The respondent named his country of citizenship, the Republic of Latvia, as the alternate country of deportation, with the stipulation that deportation to Latvia would occur only when the Soviet occupation of Latvia ends. Tr. of April 28, 1983, proceedings, at 63-64. The Government, stating that "any attempt to deport the respondent to Latvia would be futile" since the United States has never recognized the incorporation of Latvia into the Soviet Union, recommended that Latvia not be named as a country of deportation. The Government proposed that the Federal Republic of Germany be named instead, since it is both "the country from which [the respondent] last entered the United States" and "the country in which is located the foreign port at which [the respondent] embarked for the United States." Exh. 124. *See* section 243(a)(1) and (2) of the Act, regarding place of deportation. Inasmuch as the respondent designated Switzerland, we shall, in accordance with section 243(a), order him deported there. Should Switzerland be unwilling to accept the respondent, alternate countries of deportation as provided in section 243(a) may of course be named in reopened proceedings.

ORDER: The decision of the immigration judge ordering the proceedings terminated is vacated, and the appeal is sustained.

FURTHER ORDER: The respondent shall be deported from the United States to Switzerland.

Chairman

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Dated June 30, 1983

UNITED STATES DEPARTMENT OF JUSTICE
Executive Office for Immigration Review

File: A8 194 566 - New York, NY Date: June 30, 1983

IN DEPORTATION PROCEEDINGS

In the Matter of

Boleslaus MAIKOUSKIS

-Respondent-

ON BEHALF OF RESPONDENT:	ON BEHALF OF SERVICE:
Invars Berzins, P.C. 484 West Montauk Highway Babylon, NY 11702	Richard D. Sullivan, Esq. Jeffrey N. Mausner, Esq. General (Trial) Attorneys New York District

CHARGES:

I - I&N Act - Section 241(a)(1) - Excludable - (1924 Act) Fraud;

II - I&N Act - Section 241(a)(1) - Excludable - DP Act Section 10 - misrepresentation;

III - I&N Act - Section 241(a)(1) - Excludable - (1918 Act) - Entry Prejudicial;

IV - I&N Act - Section 241(a)(1) - Excludable - Section 13, 1924 Act;

V - I&N Act - Section 241(a)(1) - Excludable - DP Act Section 2, 10 & 13;

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VI - I&N Act - Section 241(a)(19) - Participated in persecution under Nazi or associated government;

VII - I&N Act - Section 241(a)(1) - Excludable - DP Act Section 13 - Hostile movement member or participant.

APPLICATIONS: I&N Act - Section 241(f) - (8 USC §1251(f) - Termination;

I&N Act - Section 208 - (8 USC §1158) - Asylum;

I&N Act - Section 243(h) - (8 USC §1253(h) - Withholding of deportation to Soviet Union;

I&N Act - Section 244(a)(1) - (8 USC §1254(a)(1) - Suspension of deportation;

I&N Act - Section 244(e) - (8 USC §1254(e) - Voluntary departure.

DECISION OF THE IMMIGRATION JUDGE

I

The respondent is a 79 year old, married male alien, a native and citizen of the Republic of Latvia, who entered the United States at New York, New York on or about December 22, 1951. He was then admitted as a displaced person under the Act of June 25, 1948 as amended. At that time, the respondent presented an immigrant visa, issued to him November 14, 1951 in Hamburg Germany.

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Deportability of the respondent is charged under seven separately stated charges made by the Government during this proceeding, which was instituted by issuance of an Order to Show Cause on October 13, 1976. The allegations and charges upon which the Government finally relies are set forth in the original Order to Show Cause,[1] a superceding Order to Show Cause dated December 21, 1976,[2] and five Notices of Additional Charges, filed from time to time during the course of the proceeding.[3] To avoid confusion as to exactly what charges are made by the Government, and what allegations are relied upon as the ultimate facts bringing the respondent within each of the specific charges, a conference was convened on April 28, 1983. As a result of that conference, with the trial attorneys and the respondent's representative, the issues have been clarified so that we may foreshorten the discussion of the extensive record of proceedings compiled over the past six and one-half years.

DISCUSSION OF THE CONDENSED ALLEGATIONS AND CHARGES

II

In the course of this proceeding, the Government issued two Orders to Show Cause and five Notices of Additional Charges containing 31 separate allegations of fact. These 31 numbered allegations, as set forth in Exhibits A, 1, 3, 18, 21, 22 and 23 are condensed and restated in 16 separate numbered paragraphs which are now a part of the record as Exhibit 133. At the hearing held on April 28, 1983, the Government agreed that the

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[1] Exhibit A.

[2] Exhibit 1.

[3] Exhibit 3, 18, 21, 22 and 23.

16 paragraphs represent the factual allegations upon which it relies with one modification,[4] which I do not regard as being substantial. The 16 factual allegations are the basis for the seven separately stated charges under which the respondent is deportable under rationale employed by the Government. With regard to these charges, the Government has now stated its position on each of the charges and the allegations upon which it relies as proof of these charges.

In order to provide a ready reference to the allegations and the charges, I have annexed a chart which sets forth the Government's position with regard to the allegations required to establish each of the charges on the theories which the Government has employed. Examination of that chart will show that Charges I, II and VII as set forth in Exhibit 134, rely on allegations 1, 2, 3 and 4 (and in the case of Charge number I and II on allegations 5 and possibly 7). The main thrust of the Government's case comes in allegation 6 to establish the Charges I, II and VII. Therefore, it is the Government's position that it need not prove allegations 8, 10, 11, 12, 13, 14, 15 or 16 in order to establish deportability under the first, second or seventh charge as set forth in Exhibit 134. Under that rationale, the Government is not required to establish that the respondent performed, participated or acquiesced in activities or conduct, as alleged in allegations 9 through 16 with some degree of specificity or as alleged in allegation number 8 as a generality.

As a corrolary, it would follow that Charge III and V involving excludability at entry and Charge VI under Section 241(a)(19), relating to deportability, unrelated to the time of entry, each require proof of all or some of the allegations involving personal participation, perform-

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[4] (See item number 7 listed by the Trial Attorney in his admission of proof, filed April 28, 1983. Number 7 page 4. This allegation is essentially an argument as to the relevance and materiality of the concealment alleged in paragraph six).

ance, advocacy or, at least, acquiescence in conduct contemplated by either the IRO constitution, the 1918 Act and the regulatory provisions relating to war crimes under C.F.R. 175.53 or the recently enacted deportation provision in Section 241(a)(19). Charge IV has no life of its own.

III

EXCLUDABLE: INELIGIBLE DISPLACED PERSON

- A -

On the basis of the foregoing, we can deal with the first phase of the Government's case by taking the first, second and seventh charge brought by the Government and considering them together in relation to the specific allegations upon which they are based. As I already indicated there is no issue of substance as to the first four allegations relating to alienage or the status under which respondent entered the United States. We are then confronted with only three factual allegations made by the Government, now numbered 5, 6 and 7 in Exhibit 133. Only one of these three allegations requires extensive discussion. Allegation number 5 speaks only of the respondent's representation in the documents submitted to the IRO, the Displaced Persons Commission and the American Consul, concerning his prior employment. The information that the respondent was employed as a bookkeeper during the period from December, 1941 to 1944 was obviously false. There is no genuine issue that during a substantial part of the relevant period, the respondent was employed full time as a captain of police in the Second Precinct in the town or district or Rezekne in Latvia. The representation then was a false representation which, if material, would support the Charge I and II, so that the visa which the respondent presented would be invalidated.

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The Government urges that the allegation number 7 is also an ultimate fact upon which the Charge I and II should be sustained. In my view of the case, however, I do not believe that the Government would be required to prove that allegation, to sustain either Charge I or II. With regard to Charge I, I do not find any specific provision in the 1924 Act relating to advocacy or assistance of persecution which would make such a representation, even if false, a material one. With regard to Charge number II, I believe that a false swearing as to advocacy or assistance in persecution would be a material representation in relation to Section 10 of DPA. However, on the record before me, I cannot find that it has been established by clear, convincing and unequivocal evidence that the statement on Form I-144 (affidavit as to membership in organizations and movements) which contained a signature of the respondent, constitutes a false sworn statement. The Form, which is in evidence as Exhibit 39 does not contain an executed jurat. It is impossible to state from the document itself, that the statements contained therein were sworn to before anyone at anytime. The date, on which the Government alleges the statement was executed, is the date shown on the Admission stamp which was apparently used by the arriving inspector. The stamp was affixed to that particular page, but there is no evidence whatsoever that the statement was in fact executed before an officer, on that date. The visa with which the respondent entered the United States was issued on November 14, 1951. The document to which allegation number 7 speaks, the Form I-144 "executed on December 22, 1951," could not have been a factor on which the visa had been issued a month earlier.

In view of those conclusions it is unnecessary to reach the question of whether proof of allegations numbered 10, 14, 15 or 16 would also be necessary to establish that the statements contained of Form I-144

were false statements regarding advocacy and assistance in persecution; nor is it necessary to decide if the contents of the statement in the English language was known to the respondent at the time he signed it, or that it was translated to him. Although I find that the Government has failed to establish the truth of allegation number 7, I also find that the allegation was not essential to establishing Charge number I or II.

- B -

I turn then to allegation number 6, which is a multifaceted allegation, consisting of three parts: First, that the respondent was a policeman in the Rezekne region of Latvia in 1941 through 1943; second that he failed to disclose that he had been a member of the police department and, finally, that his failure to disclose his membership was knowingly and intentionally done. This raises a variety of questions as to the significance of each of those three parts of allegation number 6. Under Charge I and Charge II, the Government must establish that the respondent was not only a member of the police department, but that he wilfully and knowingly concealed that fact. The Government argues first that such a representation was material, in that membership in the police department, in and of itself, pro se membership, would have made him an ineligible displaced person without any further inquiry. Failing that, the Government takes a second position that disclosure would have triggered a line of inquiry which might have led to a finding that the respondent was an ineligible displaced person.

A finding that the respondent was an ineligible displaced person would rest on one or another of two alternatives. The first position would be that mere membership in an organization, a proscribed organization if you will, would make that member ineligible as a displaced person regardless of any personal activity in

which he may have been involved, so long as the organization itself advocated or was responsible for specific actions or activities included within the anathema of Section 13 of the Act under Charge VII.

The second alternative would be that the concealment foreclosed inquiry which would have led to discovery of specific acts or personal participation, acquiescence or the commission of specific acts which would foreclose admission under Section 2, 10 or 13 of the Displaced Persons Act.

In this latter category, however, we would be dealing with an alien who also fell within Charge V as well as Charge VII. Moreover, under Charge V relying only on allegation number 6, the Government contends that it would be unnecessary to prove one or more of the allegations involving personal participation.[5]

The minimum required to establish allegation 6 and inadmissibility under Charge I, II or VII would be wilful concealment of membership pro se or membership with proof of organizational involvement in proscribed activity or the advocacy of persecution.

PRO SE MEMBERSHIP

The Government's position is that the respondent's membership in the police or auxiliary police of the Second Precinct in the Rezekne in or of itself made the respondent an ineligible displaced person. Under that theory, all members of the police, regardless of rank, station or personal participation in any activity were ineligible. In support of this proposition, the Government has produced as witnesses, the Consulate Officer, Rosemary Carmody, who issued the visa to the respondent on November 14, 1951, and the Displaced Persons Commis-

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[5] See Hearing Transcript pp. 20-30 - April 28, 1983.

sion Official, Conan, who was partly responsible for the review of the documents submitted by or on behalf of the respondent in connection with the Displaced Persons processing. Each of these witnesses indicated that they would not have approved the respondent's application had they known that he was a member of the police in Latvia. In addition, the Government had produced certain Exhibits 100, 104, 102 and 103, purporting to be rejections of certain DP applications by persons who were found ineligible.

However, the respondent has also produced evidence by other witnesses who were involved in the DP screening process to the effect that mere membership in the police of Latvia or any of the other Baltic countries would not have resulted in a denial, although it might have triggered further inquiry which may or may not have resulted in a rejection. See the *testimony of Imants Lesiuskis*, Exhibit 131, the *testimony of Robert G. Printz*, Exhibit 123 and *testimony of Brigitta Borcheas*, Exhibit 125. . .

The Government produced Exhibit 132, a visa issued to one Zlamars Sprogis at the same consulor section where the respondent's visa was issued. That visa shows that Sprogis had disclosed his membership in the police, and employment during the period of time from 1941 to 1944 as chief of police in another village in Latvia.

The Government has also produced a list (Exh. 75) which was a classified list of organizations, membership in which was considered inimical to the best interest of the United States. However, that list does not list the regular police of Latvia, although it lists SS police formations. The list does, however, include the Aizsargi of which the respondent was a member. As a result of his membership in the Aizsargi, and its inclusion on the inimical list, the respondent was temporarily denied a DP clearance. Subsequently, the Aizsargi was removed from the inimical list. As a result, the respondent was

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cleared for the issuance of the visa. It is clear then that the respondent may have been declared temporarily ineligible because the inclusion of the Aizsargi on the inimical list. Respondent's membership in the Aizsargi was known to the officials in the Displaced Persons Commission. As a result, his case was scrutinized and may have been rejected permanently but for the removal of the Aizsargi from the inimical list. However, it has not been shown that membership in the Aizsargi was a basis for barring the respondent from eligibility without further inquiry. Indeed, the documents submitted by the Government suggest that where membership was found then the nature of the membership, that is: whether or not it was voluntary, whether it was forced, whether it was under duress - were matters which would be considered before a person was rejected. At a minimum, however, it would appear that membership in the Aizsargi would have alerted the Displaced Persons Commission reviewing officer to at least question the respondent, and conduct whatever further inquiry may have been possible at that point. *See, for example,* the *testimony of Mr. Printz,* which has been accepted in large measure by the Government, and indeed, relied upon regarding membership in the police. The Government has produced no evidence to show that had the respondent disclosed his membership in the police, such disclosure would have triggered any more complete inquiry than that which should have been triggered by his membership in the Aizsargi. Certainly the inclusion of the Aizsargi on the list of the inimical organizations would suggest that the activities of that organization were known to the Government. The record before me shows that not only the respondent, but many other persons who were members of the Aizsargi were later - the same people who were recruited for or made members of the auxiliary police. Indeed even the Government's witnesses produced by the Soviet prosecutor in Latvia indicate that they were

members of the Aizsargi. Some of them were apparently members of the Aizsargi before they were blanketed into the police or auxiliary police or other security forces. With that background, it is certainly not clear that the mere disclosure of membership in the police department of a local town in Latvia, would have triggered any investigation more comprehensive than that suggested by Printz: That is whatever investigation he might have conducted at the site. The scope of any such investigation would seem to have been questioning of the respondent, and perhaps questioning any persons who might have had some familiarity with situations in Latvia, who were available at the particular camp where the investigation officer was functioning.

Despite the relatively large number of documents presented by the Government, I do not find and the Government has not pointed to any documents in which mere members of the police of any of the Baltic countries, seized after the Soviet invasions in 1940 were declared to be ineligible displaced persons, unless they were also found to be part of the security forces used by the Germans after 1941. The so-called inimical list refers to SS Police Regiments. If all the police were included, it would seem to be superflous to refer to SS Regiments of the police. A similar distinction was drawn by the Government's witness, Dr. Schefler.[6] The documents, to which he refers, and other testimony included in the record make distinctions between the different police groups - Group A, Group 5, Group C and so forth. I find no documents where the police as such are identified as an organization, in which mere membership disqualified any person from eligibility as a displaced person.

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[6] Schefler distinguished between Latvian Auxiliary Police of about 1000 and 7000 Latvians in Police Service. See e.g. p. 73 et seg. He also refers to security police as apparently a separate group. See testimony of Mezale, Exh. 31 p. 28-29.

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In Exhibit 25, Dr. Schefler states "It was the task of Einsatzgruppe A to liquidate the Jews of Latvia. As a result of the shortage of German manpower, *members* of the Latvian Auxiliary Police *were required* to assist in this task." In Exhibit 26, Dr. Schefler opines that Rezekne District Police participated in the shooting of 30 inhabitants of the village. In Exhibit 27, Dr. Schefler states "It is my opinion that the Auxiliary Police in Rezekne was incorporated into the District Police in Rezekne. As far as the German Police Force was concerned, the Latvian Police Forces fell under the umbrella term "Schutzmannschaften." But the documents to which he refers, make clear that Schutzmannschaften covered all security personnel such as local police, the fire departments, and apparently, the volunteer firemen as well (See Exhibit 24-13).

The witness, Conan, relied on the fact that the Schutzmannshaften appeared on the Inimical List and that all policemen were "probably" members of the Schutzmannschaften. However, the Government has not charged the respondent with having been a member of the Shutzmannshaften. There is no allegations that respondent was a member of an organization on the inimical list.[7]

Even if it were charged and proven that the respondent was a member, the Shutzmannshaften was, as Dr. Schefler said, an umbrella organization. Some of the components were not only apolitical, but essential and beneficial - the fire department - the local police function, etc.

On the basis of the entire record, I do not find that the Government has established that membership in the police, in and of itself, made the respondent an ineligible displaced person. Further, I do not find that the Government has established the Administrative practice of the Commission or the Consular Officers at the time by

[7] See page 28 of the Transcript, April 28, 1983.

clear, convincing or unequivocal evidence. Obviously visas were issued to policemen and the Government cannot say that policemen were invariably rejected.

ORGANIZATIONAL INVOLVEMENT

The next question is whether the Second Police Precinct of the Rezekne County Police Department, *as an organization*, was so involved in proscribed activity or advocacy of persecution that it would sweep all its members as a class into Section 13 of the DP Act. This, I believe, could only be shown by demonstrating actual involvement by participation, performance or acquiescence in activities constituting persecution of persons because of race, religion or national origin.

In short, proof of specific instances of such activities by the organization would seem to be essential. However, the only specific activities charged against the Police of the Second Police Precinct of Rezekne are those charged against the respondent personally. Those charges are set forth in the allegations of specific activity in allegations numbered 10, 11, 12, 13, 14 and 15.

There has been no attempt to show that the organization was conceived, organized, or functioned solely or even principally to advocate or assist in persecution. The essence of the charges would seem to be that the respondent had some voice or control in effectuating such a purpose in concert with the German overlords in Latvia. At the very least, the charges would seem to require tacit culpable acquiescence in such an objective by the organization, as such, to convert it into a "hostile movement."[8]

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[8] The indigenous police authorities of the Republic of Latvia, a government recognized by the United States, would not seem to fall within the term "movement hostile to the United States." In the summer and autumn of 1941, even the German Army was not at war with the United States.

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Beyond that then, personal participation, advocacy or acquiescence would seem to be a *sine qua non*. But that is the gravamen of the specific allegations numbered 10 through 16. Proof of some or all of those, coupled with number 6, would support not only Charge I, II, V, and VII, but possibly IV and VI.

I find the evidence of organizational complicity is not sufficiently clear, convincing or unequivocal to support a conclusion of deportability resting solely on allegations 1, 2, 3, 4, 5, and 6. I, therefore, proceed to a discussion of the evidence relating to specific personal participation, performance, advocacy or acquiescence - to wit: allegations 10, 11, 12, 13, 14, 15 and 16.

IV

ATROCITIES

- A -

The Eyewitnesses

The Government's case places total reliance on the Soviet prosecution witnesses to establish the factual allegations of participation in proscribed activity. Initially, it had relied on witnesses brought from Israel to testify in support of cruel or inhuman treatment of individuals. The witnesses from Israel and Latvia were apparently procured and identified by prosecution authorities in their respective countries to provide the Justice Department with witnesses against the respondent. The testimony elicited through both sources is not radically different in any way. In each case, the witnesses are relatively old; they are describing events remote in time and place; memory is disoriented as to the sequence of events.

In other respects there are sharp differences. The Israeli witnesses were alert, in most instances, responsive to questions, to the questioner, to the Court. Although, it

now appears all of those Israeli witnesses were giving false testimony, it was not obvious at the time that these personal identifications were without any basis in fact. I have no reason to believe that the Israeli government procured the testimony of those witnesses, knowing the testimony to be false. However, I am now called upon to accept testimony taken under the eye and supervision of the prosecutor installed by the Soviet invaders of the Republic of Latvia.

Beyond the obvious infirmities which are dramatized by the inevitable contrast between Israel and the enslaved Latvian state, the transcripts and videotapes are unconvincing as testimonial evidence on their face. The picture that emerges is of craven victims acting out a badly scripted scenario. There is a total lack of spontaneity. The picture quality is poor. The sweep of the camera's eye is confined and unvarying. Except for the names, the other participants are faceless inquisitors. The spark of life and truth is absent. Such testimony cannot support the burden the Government must bear.

In reaching my conclusion on the weight to be accorded the Soviet witnesses, I have not accepted respondent's contention that the accusations against the respondent, were part of a Soviet campaign to smear and discredit activist emigree individuals living in the West as a counterploy against charges of anti-semitism and other human rights violations in the U.S.S.R.

- B -

Kaunata

Allegation number 10 charges participation or acquiescence in the execution of a number of Jews in Kaunata, Latvia in August or September, 1941. The Trial Attorney cites the testimony of two of the Soviet witnesses, Kalnish and Mezale. Without assaying a detailed examination of the testimony, it suffices to say that the

testimony lacks details as to time, place and the exact role of the witness. Kalnish portrays himself as a blameless conduit passing on orders from respondent. On the basis of that testimony, and there is nothing else, I cannot find that the allegation number 10 has been proven.

- C -

The Audrini Massacre

Allegations 11 - 12 - 13

The fate of the village of Audrini, involving the arrest of some 200 Latvians, the burning of the village and the shooting of at least 30 of the villagers in a public act of official terror is not open to serious doubt. The respondent testified concerning it and numerous exhibits presented, touched upon it.[9]

The respondent concedes that "reasonable men cannot differ that this crime was a crime against humanity." However, he argues that there is no reliable evidence that the respondent participated in it. The Government charges the respondent participated in the arrest of the villagers,[10] and the burning of the village.[11] There is no real issue as to either event. The arrest took place after the shooting of some Latvian police in the village.[12] The respondent testified on the burning of the village and the public executions of 30 of the inhabitants.

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[9] See, for example, Exhibit 114, Exhibit 24-10, respondent's testimony, p. 368 (Sept. 1, 1981).

[10] Allegation #10.

[11] Allegation #11.

[12] Transcript p. 370.

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The respondent denies knowledge of or complicity in the deaths of the remaining villagers. The Government charges complicity in the death of those allegedly killed in the Anchupani Hills, but not those murdered in the town square.

While the facts concerning the fate of the 200 villagers who were not shot in the square have not been proven, it seems probable the most if not all were actually shot in the hills. Assuming that to be so the respondent's connection and complicity has not been shown. The arrest and public executions were ordered by the German Security Police.[13] The actual shooting of the 30 hostages was apparently carried out, in part, by Latvian Police of the First Precinct,[14] not the Second Precinct. However, the only link to the other killings comes from the Soviet prosecutor's witnesses, which I find not to be clear, convincing and unequivocal evidence.

I therefore conclude that the Service has not proven allegation number 13 by showing respondent's participation or acquiescence in the killings of the Audrini villagers, which took place in the Anchupani Hills in January 1942.

- D -

The Executions of Jews in the Anchupani Hills

The Government charges respondent with participation or acquiescence in the murder of Jews in the Anchupani Hills in the Autumn of 1941. It relies on the testimony of Dr. Schefler and three Soviet prosecutor witnesses, Zhukouskis, Miglinieks and Shalayev. It also cites Exhibit 85, and parts of Exhibit 24.

Dr. Scheffler was produced by the Government to establish that "The Latvian Auxiliary Police in Rezekne

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[13] The Betehlshabercler Sieberheitspolizei (Exhibit 24-10).

[14] See Exhibit I, Statement of Eichlis referred to by Dr. Schefler in Exhibit 26.

and the self defense unit in Rezekne * * * [participated in] * * * the murder of jews."[15] He was not produced to show what the respondent's role, if any, was. His testimony and opinions then are not evidence of the respondent's personal actions or activities.

The same observation applies to the documents which form the basis of Dr. Scheffler's opinions.

In order to fix personal culpability, the Government necessarily relies on the three Soviet prosecutor witnesses, to involve the respondent in the shooting of prisoners in the Anchupani Hills. The Trial Attorney cites twenty pages of testimony by Zhukousis, Miglienieks and Shalayev taken in May 1981 as being probative of allegation number 14.

I find the cited testimony and the record as a whole unpersuasive of the proposition urged. I, therefore, find that the truth of allegation number 14 has not been established.

- E -

Gypsies

The allegation that all gypsies in the respondent's area were arrested and sent to Rezekne, standing alone, is meaningless. The testimony cited by the Government to support allegations 15 and 16 is devoid of substance.[16]

V

DEPORTABILITY

I return then to the Service theory of the case. The Government has established that the respondent concealed his police employment in order to obtain his visa.

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[15] Transcript p. 39-40 April 28, 1983.

[16] Usne: "I really don't know." p. 12.
Kalnish: "I do not know anything about their fate." p. 20.

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The Government has not establish that such employment disqualified the respondent as a displaced person. The Government has not proven allegations number 7, 8, 10, 13, 14, 15 or 16. The Government has proven allegations 1, 2, 3, 4, 5, 6, 11 and 12. Under the Service theory those findings of fact would sustain Deportability under Charge I, II, III and VII. The Government also states the findings would sustain Deportability under Charge V and VI without proof of any of the specific allegations of participation or acquiescence in proscribed conduct.

In the circumstances here, I find the Government must establish not only a misrepresentation which cut off a relevant line of inquiry, but one which would have led to a proper determination that he was ineligible for a visa. This they have not done.

The Government has not established that he was a member or participant in a movement hostile to the United States under Section 13 of the D.P. Act. All that has been shown is that respondent was a Chief of Police in Rezekne. Charge VII is, therefore, not sustained.

The Government has not established that the respondent was excludable under Sections 2, 10, or 13 as one who advocated or assisted in persecution. It has been shown that he participated in the arrest of the Audrini villagers and in the burning of the village under orders of the German invaders of Latvia, as a reprisal against the killing of one or more Latvian policemen. That event ultimately led to the Audrini massacre. There has been no suggestion of racist motivation in that atrocity. On this record, the respondent's complicity has not been shown to have gone beyond the arrests and the burning of the village. The ultimate violation of the laws of war which followed has not been shown to be either predictable, planned or inevitable. Charge V and Charge VI are therefore not sustained.

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There remains one more substantive charge arising out of the 1918 Act, which involves entry prejudicial to the United States under former Section 175.53, Code of Federal Regulations. The Government makes that charge without any evidence or claim of prospective prejudice to the United States at time of entry.[17] Assuming that to be appropriate, it requires proof of the allegations of conduct which would bring him within the regulatory classification of crimes contrary to human decency. The allegations which I found to have been proven do not reach that level of depravity. The proven allegations, number 11 and 12 cover only the arrest of the Audrini villagers and burning of the village. Excludability at the time of entry under the 1918 Act has not been established. Charge III.

Charge I and II have not been established because it has not been shown that the respondent was, in fact excludable. Charge IV has not been established since it has not been shown that the respondent's visa was invalid.

VI

Conclusion

The foregoing discussion is dispositive of the issue of deportability. It obviates determination of the requests for discretionary relief under Section 208, 241(f), 244(a)(1) and 244(e). 8 U.S.C. 1158, 1251(f), 1254(a)(1) and 1254(e).

Pursuant to Section 243(a), 8 U.S.C. 1253(a), the respondent had designated Switzerland as the country to which deportation should be directed. The Government agreed with respondent on April 28, 1983, that the

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[17] The Board of Immigration Appeals has said "The basic question, therefore, is not whether the respondent comes within the purview of certain defined classes but rather whether his entry would be prejudicial to the interests of the United States. *Matter of Agh*, A6 801 064 (1961).

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Republic of Latvia was the only alternative place to which deportation should be ordered. Even if deportation were found, it would not have been necessary to consider relief pursuant to Section 243(h) because the only country to which deportation could be ordered was Switzerland.

ORDER: IT IS ORDERED that the proceedings be terminated.

/s/ _____
IMMIGRATION JUDGE
Francis J. Lyons

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REFERENCE CHART
(A8 194 566)

Allegation	I	II	III	IV	V	VI	VII
1 & 2	xx	xx	xx	xx	xx	xx	xx
3 & 4	xx	xx	xx	xx	xx		xx
5	xx	xx					
6	xx	xx			xx	xx	xx
7	xx	xx					
8			xx				
9				xx			
10			x		x	x	
11			x				
12			x				
13			x				
14			x		x	x	
15			x		x	x	
16			x		x	x	

Appendix E
Allegations, GX133, as Consolidated on April 28, 1983

1. You are not a citizen or national of the United States;
2. You are a native of Latvia, and a citizen of Latvia.
3. You entered the United States at New York, New York on or about December 22, 1951;
4. You then were admitted for permanent residence as a displaced person under the Act of June 25, 1948, as amended by the Act of June 16, 1950, upon presentation of an Immigrant visa issued on November 14, 1951, at Hamburg, Germany.
5. You represented to the Displaced Persons Commission that you were employed as a bookkeeper at the Rezekne Highway and Country Road Region of State Department at Riga, Latvia, from December 1941 until October 1944.
6. You (*knowingly and intentionally*) failed to disclose to the Displaced Persons Commission that you were employed as a policeman in the Second Police Precinct of the Rezekne County Police Department in Rezekne, Latvia, during the years 1941 through 1943.
7. On December 22, 1951 you executed a Form I-144, (Affidavit as to Subversive Organizations or Movements) in which you falsely swore or affirmed that you had not advocated or assisted in the persecution of any person because of race, religion, or national origin.
8. During the years 1941 through 1943, you performed, participated in, and acquiesced in activities and conduct contrary to civilization and human decency on behalf of Germany in wartime occupation of territory in and around Rezekne, Latvia.

Appendix E
Allegations, GX133, as Consolidated on April 28, 1983

9. At the time of your last entry into the United States you were not in possession of a valid immigrant visa or other document for admission to the United States as a permanent resident.

10. You participated or acquiesced in the execution of a number of Jews in the village of Kaunata, Latvia, in or about August and September, 1941.

11. You participated or acquiesced in the arrest of a number of peaceful civilian inhabitants of the village of Audrini, Latvia, in or about December, 1941.

12. You participated or acquiesced in the burning of the dwellings of a number of peaceful civilian inhabitants of the village of Audrini, Latvia, on or about January 2, 1942.

13. You participated or acquiesced in the execution of a number of peaceful civilian inhabitants of the village of Audrini, Latvia, at the location known as Anchupani Hills, on or about January 3, 1942.

14. You participated or acquiesced in the execution of Jews at the location known as the Anchupani Hills in the Autumn of 1941.

15. You issued an order in 1941 that all Gypsies within your police jurisdiction be rounded up and sent to Rezekne.

16. Pursuant to that order Gypsies were rounded up and sent to Rezekne.

Appendix F
Charges, GX134, as Consolidated on April 28, 1983

I

Section 241(a)(1) of the Immigration and Nationality Act, in that, at the time of entry, you were within one or more of the classes of aliens excludable by the law existing at the time of such entry, to wit: An immigrant not entitled under the Act of May 26, 1924, to enter the United States for the reason that the immigrant visa which you presented was not valid because procured by fraud or misrepresentation.

II

Section 241(a)(1) of the Immigration and Nationality Act, in that, at the time of entry, you were within a class of aliens excludable by the law existing at the time of such entry to wit: An immigrant not entitled under Section 10, of the Displaced Persons Act of June 25, 1948 as amended by the Act of June 16, 1950, to enter the United States for the reason that the immigrant visa which you presented was not valid because procured by a willful misrepresentation of material facts.

III

Section 241(a)(1) of the Immigration and Nationality Act, in that, at the time of entry, you were within one or more of the classes of aliens excludable by the law existing at the time of entry, to wit: A person whose entry would be prejudicial to the interest of the United States, under the Act of May 23, 1918, as amended, by the Act of June 21, 1941, Presidential Proclamation number 2523 issued on November 14, 1941, as amended by Presidential Proclamation 2850 issued on August 17, 1949, and Section 175.53 of Title 8 of the Code of Federal Regulations.

Appendix F
Charges, GX134, as Consolidated on April 28, 1983

IV

Section 241(a)(1) of the Immigration and Nationality Act, in that, at the time of entry, you were within one or more of the classes of aliens excludable by the law existing at the time of such entry, to wit: An immigrant not in possession of a valid immigration visa in violation of Section 13(a) of the Act of May 26, 1924, and not exempt from the presentation thereof by the said Act or regulations made thereunder.

V

Section 241(a)(1) of the Immigration and Nationality Act, in that at the time of entry, you were within a class of aliens excludable by the law existing at the time of such entry to wit: A person who, under Sections 2, 10, and 13, of the Displaced Persons Act of June 25, 1948, as amended by the Act of June 16, 1950, was not admissible to the United States as one who advocated or who assisted in the persecution of any person because of race, religion, or national origin.

VI

Section 241(a)(19) of the Immigration and Nationality Act, in that you ordered, incited, assisted or otherwise participated in the persecution of persons because of race, religion, national origin, or political opinion, under the direction of, or in association with, the Nazi government of Germany, any government in any area occupied by the military forces of the Nazi government of Germany, any government established with the assistance or cooperation of the Nazi government of Germany, or any government which was an ally of the Nazi government of Germany, during the period beginning on March 23, 1933, and ending on May 8, 1945.

Appendix F
Charges, GX134, as Consolidated
on April 28, 1983

VII

Section 241(a)(1) of the Immigration and Nationality Act, in that at the time of entry, you were within a class of aliens excludable by the law existing at the time of such entry, to wit: A person was not admissible to the United States under Section 13 of the Displaced Persons Act of June 25, 1948, as amended by the Act of June 16, 1950, because you had been a member of or participated in a movement which was hostile to the United States or the form of government of the United States.

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Interim Decision 2949, Board of Immigration Appeals, Dated September 8, 1983

UNITED STATES DEPARTMENT OF JUSTICE

BOARD OF IMMIGRATION APPEALS

WASHINGTON, D.C. 20530

File: A11 937 435 - San Diego

In re: EDGARS *LAIPENIEKS*

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:	Jan I. Goldsmith, Esquire Dorazio, Barnhorst, Goldsmith & Bonar Suite B-223 438 Camino Del Rio South San Diego, California 92108 Ivars Berzins, Esquire 484 West Montauk Highway Babylon, New York 11702
ON BEHALF OF SERVICE:	Allan A. Ryan, Jr., Director Neal M. Sher, Deputy Director Clarice R. Feldman Bruce J. Einhorn Michael Wolf Trial Attorneys Office of Special Investigations United States Department of Justice

ORAL ARGUMENT: January 20, 1983

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CHARGE:

ORDER: Sec. 241(a)(19), I&N Act [8 U.S.C. 1251(a)(19)]-- Assisted or participated in Nazi persecution

Sec. 241(a)(1), I&N Act [8 U.S.C. 1251(a)(1)]-- Excludable at entry under section 212(a)(19) of the Act [8 U.S.C. 1182(a)(19)]-- Procured visa by fraud or willful misrepresentation of a material fact

APPLICATION: Termination of proceedings; suspension of deportation; voluntary departure

BY: Milhollan, Chairman; Maniatis, Dunne, Morris & Vacca, Board Members

In his decision of June 9, 1982, the immigration judge determined that the Government had failed to establish that the respondent is deportable under sections 241(a)(1) and (19) of the Immigration and Nationality Act, 8 U.S.C. 1251(a)(1) and (19). Therefore, he terminated these deportation proceedings against the respondent. The Government appeals. We reverse with respect to the section 241(a)(19) charge, and, accordingly, the appeal will be sustained on that basis.

The respondent is a 69-year-old native of Latvia and citizen of Chile who was admitted to the United States for permanent residence on March 9, 1960. On June 2, 1981, the respondent was served with an Order to Show Cause alleging that he is deportable under section 241(a)(19) of the Act due to his employment and activities with the Latvian Political Police (LPP) in Riga, Latvia, during the Nazi occupation there in World War II. It is alleged tnat the respondent assisted or otherwise participated in the persecution of persons both because of

political opinion and race or religion. The respondent is also charged with having been excludable at entry in that he procured his immigrant visa by misrepresenting material facts concerning his work with the LPP, and other matters as well. The respondent's deportation hearing was conducted in 11 sessions from January 23 to February 18, 1982. The hearing transcript consists of 1,177 pages and the record contains some 150-200 Government exhibits and 14 respondent exhibits. As the proceedings progressed, the factual evidence presented focused principally on allegations regarding the respondent's assistance and participation in persecution because of political opinion. The testimony of 11 of the 12 eyewitnesses presented by the Government related almost entirely to this aspect of the case. The immigration judge ultimately concluded that the Government had failed to prove the respondent's deportability under either of the charges by clear, convincing and unequivocal evidence, as required by *Woodby v. INS*, 385 U.S. 276 (1966). Accordingly, the immigration judge ordered the proceedings terminated.

After our review of the record, we find clear, convincing and unequivocal evidence that the respondent "assisted, or otherwise participated in the persecution of . . . person[s] because of . . . political opinion" and is therefore deportable under section 241(a)(19) of the Act. Inasmuch as this finding is dispositive of the case before us and as the evidence in this regard is the clearest aspect of the case presented, the appeal will be resolved on this basis alone.

HISTORICAL BACKGROUND

The alleged events which led to the issuance of the Order to Show Cause took place primarily in 1941 and 1942 during World War II in Riga, Latvia. Latvia is one

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of three small Baltic nations located on the eastern shore of the Baltic Sea, situated between Estonia to the north and Lithuania to the south. To the west, across the Baltic Sea, is Sweden, and to the east is the Soviet Union. Latvia has an area of 25,000 square miles. Its capital is Riga, a Baltic merchant city which originated from the Germanic-Hanseatic League in the 16th century. Latvia was a part of the Russian empire from the time of Peter the Great's defeat of the Swedish empire in the early 18th century until the collapse of the Russian empire towards the end of World War I.

After the Russian revolution and Russia's withdrawal from the War, Latvia and its two Baltic state neighbors were temporarily occupied by German forces. Thereafter, Latvia, Lithuania, and Estonia declared their independence in 1918. They remained independent nations until 1940 when they were annexed by the Soviet Union following the German-Soviet treaty of 1939. On June 22, 1941, Nazi German armed forces invaded the Baltic states, forced out the Soviet troops, and quickly drove to Leningrad where the war front stabilized. Nazi Germany then established occupation governments in Latvia and the other Baltic States. They remained under Nazi German rule from 1941 until the German Army was driven out of the Baltic States by the Soviet Union in 1945. Following the defeat of Germany, the Soviet Union once again annexed the three Baltic nations. The United States has never recognized the legitimacy of the Soviet annexation.[1]

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[1] *See generally* A. Clark, *Barbarossa--The Russian-German Conflict, 1941-1945* (1965); *Times Atlas of World History*, 144 (2d ed. 1979); *Country Reports on Human Rights Practices for 1979*, 689, U.S. Department of State (1980).

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EVALUATION OF THE GOVERNMENT'S EXPERT WITNESS

Particularized historical background information was provided by testimony of the Government's expert witness, Dr. Raul Hilberg, Ph.D.[2] Dr. Hilberg is a noted author and historian in areas which comprehend the nature of Nazi German military movement and Nazi policies and their implementation in the Eastern occupied territories, including the organization of German police units and their relationship to the local indigenous Latvian police groups. Dr. Hilberg's expertise is based upon his extensive study of captured Nazi documents and other sources on wartime activities, and incorporates his research and analysis of the Nazi German persecution of Jews, communists, and its other political enemies. In support of Dr. Hilberg's testimony, the record also contains copies of several captured Nazi documents. Chief among these is Exhibit G-28, an extensive report dated October 15, 1941, from the commander of *Einsatzgruppe* "A" (to be discussed shortly), General Dr. Stahlecker, to Reichsfuehrer Heinrich Himmler, chief of the Nazi SS and second in command to Adolph Hitler in Nazi Germany. The more specific historical account

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[2] Dr. Hilberg is the author of *The Destruction of the European Jews*, Exhibit G-27, a scholarly, highly-regarded compendium of his decades of research into the holocaust. He is a doctor of Public Law and Government, McCullough Professor of Political Science at the University of Vermont, a noted author, and a presidentially-appointed member of the United States Holocaust Memorial Council. He has been accepted as an expert historical witness in the following cases: *United States v. Osidach*, 513 F.Supp. 51 (E.D.Pa. 1981); *United States v. Linnas*, 527 F.Supp. 426 (E.D.N.Y. 1981), *aff'd*, No. 81-6165 (2d Cir. January 25, 1982), *rehearing denied*, April 5, 1982; *United States v. Koziy*, 540 F. Supp. 25 (S.D.Fla. 1982); *United States v. Palciauskas*, 559 F.Supp. 1294 (M.D.Fla. 1983).

which follows is a distillation of Dr. Hilberg's testimony, with frequent reference to support found in Exhibits G-27 and G-28 and other documents of record.

A principal German policy in the Eastern occupied territories, including Latvia, was the combatting of "political enemies": Jews, communists, and anyone else suspected of being an opponent of the Nazi regime. *See* Tr. at 300-01, 304, 346, 350-51, 353, 487, 524; Exh. G-27; Exh. G-28 at 3, 9, 12, 13, 18-21, and App. 1-1. This policy was promulgated by the German S.S. and Reichs Security Main Office (*Reichssicherheitshauptampt*, or RSHA) and communicated to the field by the RSHA. Primary execution of this policy in the first instance was entrusted to four special mobile units of the RSHA called *Einsatzgruppen*, which were to follow closely on the heels of the advancing German armies into any newly-conquered territories. Tr. at 301. Dr. Hilberg described the operation of the *Einsatzgruppen* as follows:

> When the German Wehrmacht--the armed forces--attacked the USSR on June 22, 1941, the invading armies were accompanied by small mechanized killing units of the SS and Police which were tactically subordinated to the field commanders but otherwise free to go about their special business. The mobile killing units were operating in the front-line areas under a special arrangement and in a unique partnership with the German Army.

Exh. G-27 at 177, *see also* p. 183. When German Army North invaded the northern Soviet occupied territories, *Einsatzgruppe* "A" immediately followed. The subdivision of *Einsatzgruppe* "A" deployed in Latvia was *Einsatzkommando* 2, or E.K.-2. German Army North captured Riga on July 1, 1941, and E.K.-2 entered Riga within a few hours thereafter. Tr. at 302-04. When the

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German Army was unable to advance into Leningrad or beyond, the Eastern Front stabilized and E.K.-2 settled itself in Latvia for the duration of the German occupation. Tr. at 336-38.

The organizational structure of these special units was as follows. Reichsfuehrer Himmler had authority over 12 separate bureaucratic departments, including the RSHA. Tr. at 333. The RSHA was an amalgamation of two units, the *Sicherheitspolizei,* Security Police (or SP), and the *Sicherheitsdienst,* Security Service (or SD). The SP was in turn made up of two branches, the Criminal Police or *Kripo* (*Landeskriminalpolizeiamt*), and the State Police--*Gestapo* or *Stapo* (*Geheime Staatspolizei*). Tr. at 319; Exh. G-27 and 181-82. The RSHA commanded and deployed the four *Einsatzgruppen. Einsatzgruppe* "A" was headed by Dr. Stahlecker, under the title of SS Commander and Brigadier General of the Police. *Einsatzgruppe* "A" had jurisdiction over the entire Baltic area: Latvia, Estonia, Lithuania, and White Russia. Tr. at 303. E.K.-2, with jurisdiction over Latvia, was headed by S.S. Major Dr. Lange and his deputy, S.S. Major Kilste. *Ibid.*; Tr. at 345.

The E.K.-2 had three principal functional units, similar to the RSHA: the Security Service, Criminal Police (*Kripo*), and Gestapo. The role of the Security Service was one of counterintelligence and investigation. It would report on the political situation existing in the occupied country and identify various political elements --both those threatening the German authorities and those which could be recruited as collaborators. The role of the Criminal Police involved ordinary and purely criminal activities such as burglary, rape, and fraud. The Gestapo was the unit in the *Einsatzgruppen* and the *Einsatzkommandos* most responsible for and involved in the combatting of Nazi enemies. Its functions were designated by IV(A)--Communists, and IV(B)--Jews. Tr. at 319-20.

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It is also important to observe that the Security Police forces of the *Einsatzgruppen* and *Einsatzkommandos* constituted only one of two principal Nazi police organizations functioning in the Eastern occupied territories, the other being the *Ordnungsdienst (polizei),* the Order Service (or Order Police). While these two police organizations were completely separate in the Baltic and Ukrainian regions, the *Einsatzgruppen*/Security Police[3] and the Order Police were both subordinate to one official, the Higher SS and Police Leader. In the Baltic area this official was General Stahlecker, who reported directly to Himmler. Tr. at 340, 519; Exh. G-27 at 243; Exh. G-31. At the more localized level, under the direct authority of the High Leader of the SS and Police was the SS and Police Leader of Latvia named General Schroeder, who was head of both the Order Police and Security Police for that country. *Ibid.* Subordinate to Schroeder were Major Dr. Lange, commander of the Security Police (E.K.-2), and the commander of the Order Police. *Ibid.* This bureaucratic arrangement of the German police forces is important here for an understanding of both their command structure and hierarchy and that of the local indigenous police forces in the occupied territories, which were organized in a form parallel with the German police units. Tr. at 325-26, 348-350; Exh. G-28; Exh. G-31.

The necessity for establishing local indigenous police units in the occupied territories is explained by the relatively very small size of the *Einsatzgruppen* and *Einsatzkommandos.* In Latvia, for example, the entire personnel of E.K.-2 was 170 people, with but 47 of them

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[3] The terms "Security Police" and "SD" seem generally to have been used synonymously with reference to the various *Einsatzgruppen* and *Einsatzkommandos* and their "security" functions.

actual police operatives of the Security Service, Gestapo, and Criminal Police. Tr. at 322-23, 327-28, Exh. G-28 at App. 2-3. Reichsfuehrer Himmler's directive of July 25, 1941 (Exh. G-34), stated:

> The duties of the [Nazi] police in the occupied eastern territories cannot be fulfilled only with the forces of the police and SS who have been deployed and are yet to be deployed. It is therefore necessary that additional security formations be established expeditiously from the ethnic groups of the conquered territories which are acceptable to us, as has already been done to some extent by the Einsatzgruppen of the Security Police. These security formations are to be set up primarily with Ukrainians, the inhabitants of the Baltic countries, and the White Ruthenians.

See Tr. at 339-41. To fill this need in Latvia, the Latvian Auxiliary Police were formed.

AS indicated earlier, the Latvian Auxiliary Police were organized similarly to their German counterparts. Thus, they too, were composed of two separate divisions, a Security Police and an Order Police. Tr. at 325, 326, 348; Exh. G-31. The Security Police were then similarly divided into a criminal and a political section, called the Latvian Criminal Police and the Latvian Political Police or Department (LPP), the latter being roughly the Latvian counterpart of the Nazi Security Service and Gestapo. Tr. at 329, 347, 350, 352, 518, 524; Exh. G-28 at 12-14; Exh. G-31.

The Latvian official in charge of all Latvian Auxiliary Police was Lt. Colonel Veiss. Tr. at 347-48, 350, 512, 520, Exh. G-31. Under him were commanders of the Latvian Security Police and Order Police. The chief of the LPP for all of Latvia was named Teidemanis, who was based in the capital, Riga. Tr. at 350, 530. At the

local level in the larger cities such as Riga, a Latvian Police prefect was in charge of both Latvian Security Police and Order Police. The Police Precinct of Riga was named Stiglics. Tr. at 323, 347, 515, 539; Exh. G-28 at 12; Exh. G-31. The LPP had 217 employees in Riga. Exh. G-28, App. 4-1.

The paramount principle in organization of the Latvian Auxiliary Police was that they were fully under the control of, subordinate to, and received orders from, the Nazi Police authorities. Tr. at 306, 342-43, 348; Exh. G-28, G-31. Salaries of the Latvian Auxiliary Police were paid out of the German police budget. Tr. at 352; Exh. G-28 at 13. Although the Latvian Auxiliary Police had its own internal chain of command, Latvian police officials also took orders directly from their particular counterpart in the German Police. *Ibid.*; Tr. at 348-49. Thus, Latvian Auxiliary Police Chief Veiss reported to the German Police chief of Latvia, General Schroeder. Tr. at 348. Teidemanis, chief of the LPP, and the head of the Latvian Criminal Police reported directly to their German counterpart Major Lange, head of E.K.-2. Tr. at 342; *see also* Tr. at 520. The Prefect of Riga was directed by the German Security Police and Order Police chiefs, to whom the Prefect regularly reported. Tr. at 323, 347, 515, 539.

Control by the Germans over the local indigenous Latvian police forces is continually emphasized by Dr. Hilberg and the several German documents of record. For example, the German organizational directive regarding German and Latvian police in Latvia, Exhibit G-31, states: "The principle is: The German police agencies are in command, the Latvian police personnel [are] the implementing force." This was affirmed by Dr. Hilberg. Tr. at 343. A letter from the General Commissar of Latvia in Riga--the highest German *civilian* official in

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Latvia--to the Reichs Commissar for Ostland--the highest civilian German official for the entire Baltic region--dated December 10, 1942 stated: "All police forces in the General District of Latvia are directly subordinate to the German police authorities. The chain of command in the police sector runs from the Reichsfuehrer of the SS through the German police authorities directly down to the last [Latvian] police official . . . ." Exh. G-37; *see* Tr. at 343, 355-56. And, *Einsatzgruppe* "A" commander General Stahlecker reported to Himmler that the Latvian Security police, including the LPP, "works under the constant supervision of the *Einsatzkommando* 2, from whom it receives its work guidelines and to whom it must continually furnish detailed reports on its activity . . . . [I]t is guaranteed that all important procedures, *especially the political-police* [*LPP*] *procedures,* will be processed by German police personnel." (Emphasis supplied). *Id.* at 12, 14. Thus, the control of the Germans over the various Latvian police units, particularly the LPP, seems clear.

The general purpose of the Latvian Auxiliary Police was to accomplish the aims of the Nazis. *See, e.g.,* Tr. at 348. Of those aims, "the [t]op priority in the work of the [German] Security Police . . . was the fight against Communism and Judaism." Exh. G-28 at 18. Dr. Stahlecker reported that after the arrival of German troops in Latvia, local indigenous police units were formed with "[t]he object . . . above all to eliminate those elements who tried to hide their Communist beliefs . . . ." Exh. G-28 at 12. Thus, Dr. Hilberg testified that the mission of the various indigenous Latvian Auxiliary police units was exactly the same as their particular counterpart in the German Order Police and E.K.-2. "There was no independent mission on the part of any indigenous police force." Tr. at 329.

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As discussed earlier, the role of the LPP was generally analogous to the Gestapo and Security Service units of the German E.K.-2/Security Police, *i.e.*, to "arrest Jews and Communists as well as other political opponents or suspects as the case would arise . . . ." Tr. at 350-51. However, the LPP did *not* have the duty of killing any of the individuals concerned.[4] Tr. at 502-03; 520. Dr. Stahlecker reported to Himmler that while the LPP was "directly subordinate to the German Security Police [E.K.-2,] [i]ts activity is limited to investigation, arrest and interrogation, as well as the procurement of evidence. After completing this work, the files are submitted to the *Einsatzkommando* together with a recommended decision." Exh. G-28 at 14. This was confirmed by Dr. Hilberg. Tr. at 488. Hilberg was adamant that the LPP was, on behalf of the Germans, involved with both Jews and communists. However, the LPP was mostly involved with Jews only in the summer of 1941; from the autumn of 1941 when the remaining Jews were isolated in the Riga ghettos, the LPP no longer dealt with Jews except in isolated instances.[5] Tr. at 525-26. This indicates, therefore, that at least from the latter part of 1941 and on, the LPP dealt primarily with the remaining principal Nazi "enemy" in the eastern occupied territory, communists.

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[4] A large part of the "executive" action was taken by a section of the Latvian Order Police called the *Schutzmannschaft*, and by a Latvian detachment within the E.K.-2 itself called the "Arajs Kommando." Tr. at 502-507, 509-11.

[5] By October 15, 1941, nearly 6,000 Jews and several hundred communists were killed in Riga, nearly all of them during July and August. Tr. at 305, 527; Exh. 28, App. 1-1. In September, Jewish ghettos were being established, and by October 15, virtually all of the remaining 28,000 Jews in Riga were assigned to the ghettos. As of December 8, 1941, only 4,500 Jews remained alive in Riga, the balance having been killed by, or under order of, the occupying Nazi Germans. Tr. at 324; 525-26.

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It is also important here to make reference to the Riga Central Prison (RCP), the largest political prison in Latvia. Exhibit G-28, App. 5-3, reflects that on October 15, 1941, RCP held over 2,800 political prisoners (over 40% of all political prisoners in Latvia), and held but a handful of criminal prisoners. The political prisoners in RCP generally were placed there by the E.K.-2 or the LPP. Dr. Hilberg testified that the "likelihood would have been very great" that some of these political prisoners were eventually killed. RCP was under the direct authority of Major Lange and the E.K.-2. The chain of command from the E.K.-2 ran through the Prefect of Riga for administrative control and through Teidemanis and the LPP for functional control, *i.e.*, determining what was actually done with the prisoners at Riga Central Prison, including their final "disposition." Tr. at 330-31, 353-54, 538-40.

The close relationship between the German and Latvian police units in Riga and all of Latvia continued throughout the entire German occupation until the summer of 1944 when Soviet troops began a counter-offensive and pushed back the German army. At one point, German troops in Riga were encircled and cut off, but the Germans eventually effected a breakout and escaped, with the Soviets subsequently retaking Riga.

TESTIMONY OF THE GOVERNMENT'S EYEWITNESSES

In addition to the Government's expert witness Dr. Hilberg, and two other expert witnesses not here relevant, the Government introduced the testimony of 12 eyewitnesses present in Riga during the time of the events in question. What follows is a selective and particularized summary of the testimony of all but one of these eyewitnesses. Two of these witnesses testified personally

at the hearing. The other nine were deposed on videotape in the Soviet Union under questioning by counsel for the Government and the respondent, and by the presiding Soviet official. These videotaped depositions were also transcribed for the record. Much of the testimony which these witnesses provided with regard to identifying the respondent and his actions and conduct as a member of the LPP at RCP is the subject of controversy and great dispute by the respondent. However, in the summaries which follow, we do not find it necessary to rely on this disputed testimony. Rather, the testimony of these witnesses--all but two of whom were prisoners at RCP--generally will be used only insofar as it illustrates the type of persons who were incarcerated at RCP and what happened to them, or is otherwise not inconsistent with the respondent's testimony.

We note preliminarily, and without specific reference in the individual testimony which follows, that most of the witnesses stated they were arrested, detained, and interrogated by, and routinely came in contact with, only Latvian--not German--officers, guards, etc., during the course of their incarceration at RCP. The general procedure followed in their arrests was for the prisoners to be held initially in cells located beneath the Riga Prefecture for a period of a few days before being transferred to RCP for more long-term incarceration and questioning.

One former RCP inmate who testified at the hearing was Edwards Virsis. Virsis was imprisoned at RCP from July 1941 to August 1942. He testified he had done nothing to cause himself to be arrested and imprisoned. One possible explanation for his arrest was that he was far away from his home when the Germans invaded the Baltic region and he was suspected of being one of the many communists who fled with the Soviet troops during

their retreat. Tr. at 567-73, 580. With respect to Virsis' testimony, the immigration judge found that he "was apparently charged with having been a pro-Soviet who fled with the Russians when the German troops arrived in Latvia during 1941." Op. at 70.

The record also contains a German document issued to Virsis upon his release from RCP, Exh. G-41A. This "Certificate" was issued by the "German Security Police," "Einsatzkommando Riga," "E.K.-2," and states in printed standardized language that the person named therein, Virsis, "was, because of his political activity, arrested and is, after being checked out through the German Security Police, hereby released. A new arrest is possible according to the case files and on the orders of the German Security Police." Tr. at 583. This document clearly illustrates the fact that while it was the Latvian Police who generally performed the actual arrest, interrogation, and other duties incident to the incarceration of political prisoners at RCP, the ultimate authority over the fate and disposition of these prisoners lay with the Nazi E.K.-2.

Arnold Berzins, who testified at the hearing, and Janis Engelis, who testified by videotape (Exh. G-45), were held in RCP because they were suspected of having prepared lists of persons to be deported from Latvia during the Soviet occupation in 1940 and 1941.

Edgars Rode testified by videotape that he was incarcerated first at the Riga Prefecture and then at RCP from July 1941 until the end of 1942. Rode had been a sportsman in Latvia since 1924. During the Soviet occupation in 1940 and 1941, he was assigned to work on the sports and physical culture committee as an athletics inspector. Exh. G-44 at 9, 12, 48-49. Rode testified that his fellow prisoners had been arrested and jailed because they were Soviet sympathizers. *Id.* at 15.

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Carlis Smekerstans was incarcerated at RCP from July to November 1941. Exh. G-46 at 8-9, 16-18. He stated that he had participated in public life during the Soviet occupation and had belonged to the Worker's Guard, and he believed his arrest was a result of those activities. *See* respondent's App. Br. at 108. Smekerstans was released to work at a sawmill near a concentration camp upon agreeing that he would have nothing to do with Jews and communists, nor with any political activities. Exh. G-46 at 20-22.

Nikolays Endelis was arrested July 6, 1941, and detained at the Riga Prefecture for four or five days before going to RCP, where he remained until sometime in 1942 or 1943. Thereafter, he was taken to Salaspils concentration camp for approximately one and a half years. Exh. G-47 at 7, 15, 28. He previously had worked in a bicycle factory where he and 16 co-workers were arrested by Latvian police after the German occupation. Endelis admitted to his interrogators at RCP that he "had been an activist and . . . a so-called Stakhanovist, the one who rationalizes production or processes, simpler or easier means of producing goods." *Id.* at 20-21. He also described the treatment of some fellow prisoners at RCP, including some Komsomol members[6] who were interrogated and beaten, disappeared, and presumed dead. *Id.* at 27.

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[6] This term was used in the testimony of several eyewitnesses as well as that of the respondent and Dr. Hilberg, seemingly with some connection to communism but never with a specific definition or explanation. However, Endelis did describe its meaning, saying that "Komsomol members were those involved in the upbringing, the education of young people in order to [*sic*] them to become real Soviet citizens." *Id.* at 27. Thus, this "Komsomol" apparently was charged with the indoctrination, socialization, and training of youngsters to become model citizens of the Soviet communist system.

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Karlis Zvirgzds was imprisoned at RCP and later at Salaspils concentration camp for a total of about three years. Exh. G-48 at 9. Zvirgzds stated that prior to the German occupation and his arrest, he had been a peasant on his father's farm and was also head of the local Agricultural Society. *Id.* at 13. During Zvirgzds' interrogations after arrest, he was asked whether he was a communist or a Komsomol member. *Id.* at 36. He testified that he and some other prisoners from RCP were among the first political prisoners to be held at the concentration camp upon their arrival in May 1942, since all the other prisoners there were Jews. *Id.* at 17. The immigration judge's characterization of Zvirgzds—undisputed by the respondent—was that he "was thought to be a communist party member and sympathetic to the Russians." Op. at 70.

Juris Beikmanis was a Latvian farmer who was also a communist activist and reserve militiaman prior to the German occupation. However, he never fought against the Germans. Exh. G-51 at 9-10, 15. Beikmanis was incarcerated at RCP from late June 1941 to August 29, 1941, for, he believes, his membership in the reserve militia. *Ibid.* Beikmanis stated that he and his fellow prisoners at RCP were jailed because they were communist activists, giving as one example the case of prisoner Schmit who was a Party organizer for his country. *Id.* at 20, 23. Exhibit G-51 also contains another document issued by the E.K.-2 at Riga releasing this political prisoner from custody, which is identical to the "Certificate" issued to Edwards Virsis.

Janis Otto Ignats was a Latvian Communist Party member in a workers battalion which fought with the Soviet Army in defense of Liepaja, Latvia at the time of the German invasion. When the Germans routed the defenders, Ignats fled with them in defeat, and eventually

was arrested by Latvian police near Riga. Exh. G-50 at 13-15, 30. He was imprisoned at RCP from July 1941 to May 1942, when he was taken to Salaspils concentration camp. He later was taken to Talin prison, Stuthaven concentration camp, Bissingen, and finally to Dachau concentration camp, where he was liberated by American troops on April 29, 1945. *Id.* at 33-35. Ignats testified that his fellow prisoners at RCP were political offenders, accused of "being members of the YCL [presumably the Young Communist League], of Komsomol, the Red Guards, militia," or the "Security Department." *Id.* at 20-21. He also described how the RCP prisoners were divided into groups according to the type of their political activity, *e.g.*, Komsomol members, Party members, activists, trade union members, and former guards. *Id.* at 24, 35-36. Ignats defined communist "activists" as those who were "active sportsmen, those who took part [in] editing wall papers, and in general cultural work." *Ibid.* Ignats stated that eventually the political prisoners at RCP were either released, shot, or taken to a concentration camp. *Id.* at 20.

Without making specific reference in the testimonies of these witnesses who were prisoners in RCP, we note that all of them testified that prisoners at RCP were frequently beaten during interrogations. Several described how they themselves were severely beaten with fists, blackjacks, or truncheons. Several saw and/or heard other prisoners similarly beaten or saw the results of such beatings after the interrogations were completed and the prisoners were returned to their cells. Some also told of how they were forced to swallow ink or pills they thought were poison. We also have seen that several of the witnesses were taken to Nazi concentration camps or know of others who were taken to concentration camps

or were sometimes simply killed.[7] Thus, it is clear that prisoners at RCP were not only deprived of their liberty but commonly subjected to various forms of brutal mistreatment as well.

Vladimir Striguns was one of two witnesses who were not imprisoned at RCP. Striguns had been working for the Communist Party in a partisan group of the Soviet army before the German occupation. Exh. G-49 at 16-17, 50-51. At that time, he was apparently captured and placed in a German prisoner-of-war camp. Upon his release from that camp in December 1941, Striguns returned home and reported to an office at the Riga Prefecture to obtain documents. There, he was arrested after being identified by the wife of the SD chief. *Id.* at 12-13. Striguns was subsequently interrogated by one Persis Sauls. Sauls told Striguns that he would be killed for his activities during the Soviet occupation unless he agreed to collaborate with the SD and work as an informer, identifying persons he knew to be communists. Striguns agreed to collaborate. *Id.* at 16-18. In this role he dealt only with Teidemanis—the chief of the LPP, Sauls, or Albert Purins. *Id.* at 28.

Sometime in mid 1942, Striguns met and became friends with Miervaldis Laipenieks, the respondent's younger brother, who was also a member of the LPP. *Id.* at 7-8, 16, 18, 20, 28, 41-42. Striguns saw Miervaldis several times a week, often meeting him at Miervaldis' offices at LPP headquarters or at the restaurant where Striguns worked. *Id.* at 18, 21, 23. Striguns usually would

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[7] The respondent's testimony does not contradict this testimony. He admits that he did strike prisoners with his hands (*see* p. 22, *infra*), but he denies that he ever beat prisoners with clubs, administered phony poison pills, sent anyone to concentration camps, or was involved in any killings. Nevertheless, he has not denied that such treatment was inflicted upon RCP prisoners by others. *See also* testimony of Salminsh, *infra*, at pp. 15-16.

see the respondent when he met with Miervaldis at LPP headquarters. *Id.* at 23. The last time he remembers seeing the respondent was in 1943 before the respondent left the LPP to start a bakery shop. *Id.* at 39.

Because of his collaboration with the LPP and friendship with Miervaldis, Striguns was able to describe in some detail many facts concerning the LPP. He stated that the LPP offices were first located in the Prefecture at Aspaziya Boulevard, which had cells in the basement where he was held upon his arrest in late 1941. *Id.* at 8-9, 13. In approximately the spring of 1942, the LPP moved to a building at Number 6, Rainis Boulevard. It housed both the German SD and LPP, each having a separate entrance on Rainis Street and Rainis Boulevard, respectively. *Id.* at 8-9, 13, 15. Some of the Germans wore uniforms, some wore civilian clothes. The LPP did not wear uniforms. *Id.* at 14-15.

In addition to the Laipenieks brothers, Teidemanis, Sauls, and Purins, Striguns also recalled men named Kanders and Sterns as being members of the LPP. *Id.* at 27. He stated that the LPP had certain internal divisions, among them an investigations group, an "Agentura," and groups involved with surveillance and with provocateurs. *Id.* at 46-47. Striguns testified that *the role of the LPP under Teidemanis was to liquidate "the Communist Party and all other groups that were against the German Order."* (Emphasis supplied). *Id.* at 31. He also stated that there was an "Arajs gang" which was a separate department in the German SD engaged in shooting and guarding. *Id.* at 32.

The respondent's counsel asked Striguns if Miervaldis Laipenieks knew that he (Striguns) had been arrested in December 1941, to which Striguns replied, "I think that there was not a single thing that the Gestapo did not know about me." When asked whether the

respondent also knew about him, Striguns replied, "That is the same Gestapo." *Id.* at 52.

Edgars Salminsh, who testified by videotape, was not a prisoner at RCP but a fellow investigator with the respondent in the LPP. Exh. G-52 at 9, 14, 20. In describing the organization and operation of the LPP itself, he testified that it was divided into three sections: Operations, Investigations, and Agentura. *Id.* at 8, 21. Each section had its own staff of investigators. *Id.* at 24. The Agentura collected preliminary information on suspects and shadowed people. Its reports were passed along to the Operations section for it to effect the arrests of suspects. *Id.* at 56-57. The Investigations section did not investigate suspects unless there existed a preliminary report from the Agentura and a charge against them. *Id.* at 60.

Salminsh identified the chief of the entire LPP as a man named Tiedemanis. *Id.* at 27, 56. Zauls (Sauls) was head of the Agentura section and Teidemanis' deputy. *Id.* at 56. Purins was Zauls' deputy. *Id.* at 27. Sterns was head of the Operations section. *Id.* at 26-27, 36. Inzers was head of the Investigations section for about the last two years of the German occupation. *Id.* at 26. The chiefs of the three sections of the LPP reported to Teidemanis. *Id.* at 38. Lange was head of the German SD/E.K.-2. Salminsh emphasized that the LPP was at all times subordinate to the SD. *Id.* at 22-23.

Salminsh began working for the LPP in mid 1941 in the Operations section and, a short while later, worked in the Investigations section. *Id.* at 9, 10-20, 22, 26. Salminsh's duties as an investigator included searching for information and interrogating prisoners. *Id.* at 9, 20. He also occasionally interrogated prisoners at RCP. He acknowledged that physical influence often was used in interrogating prisoners, although he tried not to use it

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himself. However, many of his colleagues heavily used physical influence. *Id.* at 32.

Salminsh explained that LPP investigators would obtain the testimony of witnesses, compile written documents, etc., and give their reports to the section chief. The section chief then made his written assessment of the case which he gave to Teidemanis and Lange. These two made the final determination as to whether the person would be sent to RCP, a concentration camp, or sometimes killed. *Id.* at 35-36. Executions were carried out by the Arajs Command. *Id.* at 37. Prisoners at RCP were released from custody only upon orders of SD chief Lange.[8]

Salminsh stated that he first worked for the LPP out of the Riga Prefecture. *Id.* at 14. Prisoners were held in the basement cells of the Prefecture. If there were indications of their guilt, they were sent to RCP. *Ibid.* The LPP later moved out of the Prefecture in early 1942 to a building at Rainis Boulevard next to the SD headquarters.[9]

Salminsh emphasized that the LPP dealt exclusively with Soviet sympathizers and supporters, not Jews. *Id.* at 58. He stated that among the prisoners held at RCP were those who had worked in the underground or had hidden or sheltered Jews or prisoners-of-war, Red Guards, Soviets collaborators, and communist activists. *Id.* at 16, 33, 41. In "separate cases," Jews were also held at RCP. However, Salminsh never interrogated any Jews because they were strictly isolated. *Id.* at 33. He also explained that if, during the interrogation of a prisoner, the LPP learned that he had helped or been involved with Jews,

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[8] *See* pp. 11 and 13, *supra;* Release "Certificates" of RCP prisoners Virsis and Beikmanis, Exhs. G-41A and 51.

[9] This is in full accord with Strigun's testimong at p. 14, *supra.*

he was to be turned over to a special department under Lange in the E.K.-2—either Department 4A or 4B (he could not remember which), which dealt particularly with Jews.[10] This department was comprised only of Germans. *Id.* at 39.

Salminsh testified that the respondent also was an investigator in the LPP. *Id.* at 9-10, 25, 28. He identified the respondent as a former sportsman and runner in Latvia. *Id.* at 28. At first, Salminsh said that the respondent was in the Investigations section and also the Operations section. *Id.* at 9-10. He finally seemed to settle on the respondent being only in the Operations section (which was headed by Sterns).[11] *Id.* at 52. Salminsh recalled that the respondent had a younger, shorter brother who also was in the LPP. This younger brother was not as well-educated as the respondent and so did not work as an investigator; he collected information and shadowed people. *Id.* at 10. Salminsh stated that the respondent was one of from five to eight investigators who were sent to interrogate prisoners at RCP. *Id.* at 25, 28, 58. He also noted that the interrogators were instructed not to identify themselves to the prisoners whom they interrogated. *Id.* at 58-59. Salminsh further stated that in the last period of the German occupation the respondent was not in the LPP but had gone into trade. *Id.* at 53.

In other testimony, Salminsh stated that the name Vladimir Striguns was familiar to him but he could not remember in what context. *Id.* at 54. He noted that during the German occupation, the organization of trade unions or any other organizations was forbidden. *Id.*

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[10] Dr. Hilberg testified that section IV(B) of the RSHA, *Einsatzgruppen*, and *Einsatzkommandos* was assigned to deal with Jews. Tr. at 319-20; p. 5, *supra*.

[11] *See* p. 20, n. 13, *infra*.

at 41. Salminsh stated finally that he had been tried and punished for his role in the LPP. *Id.* at 61.

THE RESPONDENT'S TESTIMONY

The respondent himself testified on four days over the course of the hearing. The following summary is not fully comprehensive but excludes testimony concerning the section 241(a)(1) misrepresentation charge and other matters not directly relevant to our resolution of the charge under section 241(a)(19) of the Act.

From 1928 until 1934, at the ages of 15-21, the respondent attended a Latvian teachers' college. Tr. at 212. There, the respondent stated he was introduced to new political concepts and soon became a member of a nationalistic youth organization which actively opposed socialist-communist ideas. Tr. at 213. The respondent graduated from the teachers' college in 1934. Tr. at 57-58, 61. In the fall of that year, the respondent volunteered for the Latvian Army and was assigned to the 6th Riga Regiment. Tr. at 214. He specializd in the ski troops and was later assigned to the officers' school. Tr. at 214. The respondent subsequently held the rank of warrant officer, a rank just below lieutenant, until he left the service in the fall of 1935. Tr. at 80, 214.

The respondent attended the Latvian State University in Riga from 1936 to 1939. Tr. at 66, 81. During that time, he worked as a teacher in the mornings, and attended class, studied, and engaged in sports activities in the afternoons. Tr. at 91, 215. The respondent graduated from the University in 1939 and received a bachelor's degree in Economics. Tr. at 91. On September 3, 1939, he married Tamara Matisons. Tr. at 86, 216. He then went to work teaching math, chemistry, the Latvian language, and physical education in a public elementary

school. Tr. at 91, 92. He also was in the reserve at that time and was called into service just before the Soviet invasion. Tr. at 92.

During the 1930's and 1940's, the respondent traveled all over Europe to track and ski meets. Tr. at 93. He traveled to Germany once in 1933 and again in 1936 to the Olympic Games. Tr. at 84-85, 86. In the summer of 1936 and 1938, the Latvian government sent him to Finland where he was able to further develop his athletic abilities. Tr. at 215. He participated in the Army Sports Club and, before the war, many newspaper articles were written about his sports activities. Tr. at 248-49.

After the Soviet annexation of Latvia in June 1940, the respondent continued to work both as a teacher and as a property manager, but it was a very hard time and many of his friends were arrested and murdered by the Soviets. Tr. at 93, 217, 1048. He testified that during the Soviet occupation, many of his students disappeared and some were even arrested in his classroom. Tr. at 217. In June 1941, his wife's parents were forceably carried off to Siberia where they died. Tr. at 217. At that time, the respondent became convinced that he and his family were also doomed for annihilation, and he fled with his wife and one-year-old son into the forest. Tr. at 93, 94, 97, 217-18, 863. They hid there for approximately two weeks until the German troops "liberated" them. Tr. at at 217-18, 864. The respondent stated that the Soviets deported 60,000 to 75,000 Latvians to Siberia during this time, and also killed thousands more.Tr. at 93, 1048.

Upon his return to Riga, the respondent volunteered to assist the Latvian Auxiliary Help organizations in identifying those Latvians who had been killed by the Soviets and buried in mass graves. Tr. at 218. Two to three days a week, the respondent helped with the task of identifying the exhumed bodies over a period of approximately two to three months. Tr. at 218.

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The respondent testified that before the Soviet occupation of Latvia, there existed a government Political Department charged with enforcing the legal ban on the Communist Party in independent Latvia. Most members of this Department were killed during the Soviet occupation. The respondent claimed that the few survivors of that organization such as Victor Bucenieks, Sterns, Zauls, Lieberts, and Teidemanis, organized the LPP after the Germans drove out the Soviets. Tr. at 985-88.

In explaining how he came to join the LPP, the respondent stated that Victor Bucenieks was a fellow athlete and runner in his sports club whom he had known for a long time. Bucenieks spoke with the respondent in the summer of 1941, and told him that he had worked for the Political Department before he went into hiding during the Soviet occupation. Bucenieks said that the LPP was now being organized and was seeking new members. The respondent decided to join, and, after a background investigation, he was approved to start work for the LPP in late July. Tr. at 220-22, 988-99.

In his testimony, the respondent described the organization and operation of the LPP, including the names of certain officials. He stated that the LPP had three units: an Investigations section, Operations section, and "Agentura." Tr. at 240. The role of the Agentura, at least in part, was to "shadow" suspects and to send its agents into underground groups. Tr. at 241. The Operations section would interrogate witnesses and otherwise gather background information on suspects, and arrest people. Tr. at 240, 999. The respondent worked in the Investigations section. Tr. at 993. Dr. Rudolph Lange was head of the German SD/E.K.-2. Tr. at 242, 1041. Teidemanis was head of the LPP. Tr. at 242, 261, 266. The remainder of the respondent's testimony in which he identified the chief personnel of the LPP was some-

what confusing and not wholly consistent. The respondent stated that Alfred Sterns was head of the Operations section; Persijs Zauls was head of the Agentura; the Investigations section was headed first by Inzers, and later Sterns. Tr. at 240. Albert Purins handled informers.[12] Tr. at 242. The respondent once stated that Purins was head of the Agentura. Tr. at 1040. At p. 240, the respondent said that Sterns was at one time the head of the Investigations section. At p. 993, the respondent identified Sterns as the head of the Operations section and Persijs Zauls as the first chief of the Investigations section, which was later headed by Inzers. The respondent once identified Sterns as his immediate superior in the LPP. Tr. at 241. On another occasion he named Sterns and Zauls as his superiors. Tr. at 991. Inzers was also identified as the respondent's superior. Tr. at 1001.[13]

The record also contains a certified copy and translation of a document dated July 9, 1942, in Riga, Latvia, Exhibit G-57. The letterhead of that document reflects that it is from the "Commander of the Security Police and Security Service of Latvia, Latvian Political Detachment (LPP)." It is directed to the "Chief of the Latvian Criminal Detachment of Riga" and is signed by "H. Teidemanis, Chief of Latvian Political Detachment of Riga." It is co-signed by "P. Zauls, Chief, Agentura

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[12] *See* p. 14, lines 15-16, *supra*.

[13] *Cf.* the testimony of fellow LPP member Salminsh at p. 17, *supra*. Considering the variance of the respondent's testimony regarding the three or four section chiefs he named as his immediate supervisors—particularly his identification of Sterns both as his immediate superior and head of the Operations section—it is not surprising that Salminsh was of the belief that the respondent worked in the Operations section. The central consistent fact exhibited by Salminsh's testimony is that the respondent did work as an investigator and an interrogator at RCP for the LPP

section." The respondent confirmed that the names and titles of these two LPP officials were correct and accurate. Tr. at 266.

The respondent worked for the LPP as an investigator, investigating "all kinds of communists." Tr. at 234. He stated that the role of the LPP was to discover and uncover Latvian communists who remained in Latvia after the Soviet retreat and withdrawal. Tr. at 227. The respondent explained that most of the communists from the time of the Soviet occupation fled with the retreating Soviet army when the Germans invaded Latvia. Persons who were found retreating with the Soviets were brought to Riga to investigate whether they were communists. Suspected communists were imprisoned at RCP. The respondent characterized RCP as a "*terminal* prison." Tr. at 234-37.

The respondent worked out of the LPP headquarters. This was first located at the Riga Prefecture, but changed offices to Number 6, Rainis Boulevard sometime in 1942. Tr. at 230-31, 233, 264-65, 989, 994, 1000.

Part of the respondent's job as an investigator with the LPP involved obtaining information about "accused people" and their behavior during the Soviet occupation, including those responsible for deporting Latvians. Tr. at 991, 999. The respondent would obtain from his superior a list of persons whom he was to interview, often at their places of work, and ask them questions about what certain accused persons did during the Soviet occupation. For example, the respondent would go to a factory and question the directors concerning the communist activities at the factory of the "high-appointed Soviet people" who had run away. He made notes of the information he obtained and turned them over to his superior. After his report was made, the Operations section of the LPP would make any necessary arrests.

Tr. at 990-91. The respondent indicated that at times he would engage in surveillance of communist "pidgeons" and sometimes was authorized to decide when to arrest those communist suspects. Tr. at 259-60.

The respondent's duties also involved the direct interrogation of accused persons and prisoners. He was taught how to review the existing investigative reports on the prisoners, including documents and statements by witnesses, and ask questions about their activities during the Soviet occupation. The respondent would then prepare his report, or "protocols," and present this to his superior after completion of the interrogation. Much of this interrogation work was done at the LPP headquarters at the Riga Prefecture and, later, Rainis Boulevard. The respondent also regularly went to RCP to interrogate prisoners there. The respondent explained that in the beginning, RCP prisoners were brought to the LPP headquarters for interrogation. However, when transportation for the prisoners became unavailable, the respondent would go to RCP to interrogate prisoners at least once or twice a week. Tr. at 229-33, 237, 264-65, 1000-01, 1004, 1042-43, 1047-48.

The respondent described the procedure for interrogating prisoners at RCP as follows. He would arrive at his office at LPP headquarters in the morning and find a list of five or six prisoners for him to interrogate at RCP. This assignment was given to him by Sterns, Zauls, or Inzers. A group of about six investigators was assigned to conduct the various interrogations, which they conducted in pairs. Interrogations took place with one prisoner at a time, who was brought by guards from his cell to the two LPP interrogators in a separate interrogation room. The interrogators never introduced themselves to the prisoners. Tr. at 1000-06. The respondent always had a pistol with him during the interrogations

for self-protection; the respondent possessed three pistols, one of which he would carry at all times. Tr. at 259, 1006. The respondent admitted that during his interrogation of prisoners, he sometimes beat them with his hand to "help" the prisoners "to talk." Tr. at 257. He also stated that he had no say as to who was kept in or released from RCP. He would only give his protocols to his supervisors, and they made the decision. Tr. at 1019.

The respondent also described one occasion on which he actually went to a prisoners' cell at RCP. The respondent's superiors explained that RCP was overcrowded with prisoners, including "many, many innocent people who should be investigated and interrogated" so that those innocent ones could be identified expeditiously and released. Tr. at 1007. The respondent was directed to go to a cell at RCP and divide the prisoners into groups. He first separated those who lived in the Riga area from those who had resided elsewhere. This was done because it was easier to quickly obtain information on the local Riga prisoners. Tr. at 1008-09.

The Riga group was then further divided into three groups. The first was comprised of those who said they were falsely accused of being communists. "The first group . . . said they never took any part, somebody accused just them [of] being some sympathizer to the Communists Party's functionaries and organization, some just for having revenge: 'I don't like his face, so he's a communist.'"[1] Tr. at 1009. The second group contained Soviet Red Guards who had assisted in the killing and deportation of Latvians. *Ibid.* The third

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[1] Although these persons were allegedly wrongly accused, this testimony of the respondent clearly demonstrates that many persons were arrested and jailed at RCP not because of their illegal actions but merely because they were thought to be Soviet/Communist *sympathizers.*

group was comprised of Communist Party members, as well as some communist officials who were involved in actions against Latvians during the Soviet occupation. Tr. at 1009-10.

Apparently as a result of his successes in his first year with the LPP, in the autumn of 1942 people from the Latvian Army, mostly captains and lieutenants, were assigned to the respondent. Tr. at 230-31. From this time until leaving the LPP in 1943, the respondent's duties changed somewhat, and he devoted most of his time to the pursuit of Soviet agents, paratroopers, spies, and saboteurs operating inside Latvia. Tr. at 228, 233, 1030-31, 1042-43. The respondent continued to do some interrogation work at RCP, but not like before. Tr. at 1042-43.

The respondent acknowledged that he did have a brother named Miervaldis who was a member of the LPP. He worked under Sterns in the Operations section. Miervaldis' job was to interrogate witnesses and to locate and arrest suspects. Tr. at 995-99. The respondent did not recall knowing anyone named Striguns who was a friend of Miervaldis. However, when asked about Striguns' testimony concerning an episode with a Soviet spy named Rode in which the respondent had participated, the respondent agreed that there was in fact an incident which took place similar to that described by Striguns. Tr. at 1027. The respondent also confirmed that there was a man named Edgars Salminsh who worked in the Investigations section of the LPP. Tr. at 997.

In other testimony, the respondent stated that there was a group of Latvian soldiers called the Arajs Kommando which, he heard, killed people. Tr. at 203. He said that to his knowledge, the LPP did not interrogate, imprison, or otherwise become involved with Jews. Tr. at 202, 265. He dealt solely with communists. Tr. at 1044. The respondent stated that only communists were de-

tained at RCP; he was not aware of any Jews being held there. Tr. at 236-37. He also testified that he and all the LPP wore civilian clothes; only the Germans wore uniforms. Tr. at 243, 1007.

At one point in his testimony, the respondent stated that the German SD/E.K.-2 headquarters was located at "Reimers Iela" which was not the same building as the LPP headquarters. He claimed he did not know what the function of the SD was and that he had nothing to do with them. Tr. at 243. However, the respondent's subsequent testimony about how he came to resign from the LPP points up some inconsistencies with these claims. The respondent says he decided to leave the LPP because the Germans were completely taking over the LPP (contrary to his assertion that he did not know what the SD did and that he had nothing to do with them in the LPP). He explained that his request to leave the LPP prompted an investigation of him, culminating in a personal interview with Major Lange, head of the SD, at his headquarters offices on the third or fourth floor of a building on Rainis Street.[15] Lange was apparently satisfied that the respondent had performed his duties properly and was seeking to leave the LPP in order to take over the bakery of his father-in-law. Tr. at 1040-41.

Upon leaving the LPP, the respondent testified that he received a certificate which stated he had performed a great service to the German Armed Forces as a member of the LPP. This certificate later saved the lives of himself and his family when it enabled them to obtain safe passage and escape from Latvia in 1944 through the

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[15] This address of the SD headquarters on Rainis Street contradicts the respondent's earlier testimony fixing the address at "Reimers Iela." However, it is consistent with Striguns' testimony placing the SD headquarters on Rainis Street. *See* p. 14, *supra; see also* p. 16 and n. 9, *supra.*

lines of the retreating German Army during a Soviet offensive. Tr. at 245-46, 202, 1048.

After leaving Latvia, the respondent lived for various periods of time in East Prussia, Austria and France before deciding to leave Europe and immigrate to Chile in 1947. *See* Tr. at 882, 173-74, 872-73, 166-67, 173, 945, 948. In Chile, the respondent lived and worked from 1947 to 1960 as a professor of physical education and as a track coach. In 1960, he obtained a visa to immigrate to the United States and accepted a teaching position in the physical education department of the University of Denver. Exh. G-1A; respondent's App. Brief p. 27.

STATUTORY LEGAL STANDARD

Section 241(a)(19) of the Act provides for the deportation of aliens who—

> during the period beginning on March 23, 1933, and ending on May 8, 1845, under the direction of, or in association with—
>
> (A) the Nazi government of Germany,
>
> (B) any government in any area occupied by the military forces of the Nazi government of Germany,
>
> (C) any government established with the assistance or cooperation of the Nazi government of Germany, or
>
> (D) any government which was an ally of the Nazi government of Germany,
>
> ordered, incited, assisted, or otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion.

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The events at issue in this case clearly fall within the specified time frame of 1933 to 1945. The particular elements of the statute with which we are concerned here are whether: (1) "under the direction of, or in association with—the Nazi government of Germany, [or] any government in any area occupied by the military forces of the Nazi government of Germany," the respondent (2) "assisted or otherwise participated in" (3) "the persecution of any person" (4) "because of . . . political opinion." If these four elements are established by clear, convincing and unequivocal evidence, the respondent is subject to deportation.

(1) *Under the Direction of, or in Association with, the Nazi Government of Germany or Any Government in Any Area Occupied by the Military Forces of the Nazi Government of Germany*

There is no dispute that from the relevant times of mid 1941 to mid 1943, Latvia was an area occupied by the military forces of Nazi Germany. Nor does the respondent dispute that at that time he was associated with and under the direction of the LPP. The only remaining question for this first element is, did the LPP work under the direction of or in association with the Nazi government of Germany, or constitute a part of "any government" in Latvia? We have no doubt that it did.

We find that there is overwhelming evidence of record to demonstrate that the LPP (and its employees) operated under the direction of and in association with the Nazi German government, thereby satisfying the requirements of section 241(a)(19)(A). In support of this conclusion, we need only briefly summarize some of the evidence, which includes the expert testimony of Dr.

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Hilberg, the many Nazi documents, and the corroborative testimony of Striguns, Salminsh, and even the respondent. For example: all Latvian police groups were organized in parallel with their Nazi counterparts; Latvian police were paid out of the German police budget; the chain of command over the LPP ran from Reichsfuehrer Himmler through Stahlecker, Schroeder, and E.K.-2 chief Lange to Teidemanis, the LPP chief; all Latvian police, *especially* the LPP, were subject to Nazi authority and direction (*see* particularly pp. 7-8 *supra*); the LPP was the implementing tool for accomplishing Nazi objectives; although prisoners at RCP were usually arrested by Latvian police and interrogated by the LPP, it was the E.K.-2 which controlled the prison and authorized the release of prisoners; even the Release Certificates themselves for these prisoners were issued by the E.K.-2 and recited that the prisoners had been "checked out through the German Security Police" and were always subject to rearrest "on the orders of the German Security Police;" the E.K.-2 and LPP apparently had adjacent headquarters; Striguns viewed the LPP and Gestapo as one in the same, and described the role of the LPP as dedicated to the elimination of German enemies; Salminsh stated flatly that the LPP was always subordinate to the SD; the respondent acknowledged that he resigned from the LPP because the Germans were completely taking it over; his resignation warranted the personal attention and involvement of the E.K.-2 chief; the respondent's discharge Commendation Certificate recited the valuable service he had performed for the Germans. Again, this is only some of the evidence of record which fully demonstrates the intimate connection and control of the Nazi German Government and E.K.-2 over the LPP.

Moreover, we find that the LPP constituted a part of the "government" in Nazi-occupied Latvia. By definition,

any police unit is inherently a department of the government, a part of its executive function which performs such duties as preventing and detecting crime, enforcing laws, and maintaining order. Indeed, a formal police group simply does not exist apart from or without sanction and authority from a government. The LPP was certainly operating as an arm of the "government" in Latvia. It matters not whether the LPP was equivalent to a reconstituted "Political Department" from the days of independent Latvia, as the respondent claims, or was merely an extension of the Nazi Security Police. The statute requires only that the LPP have been an arm of "*any* government" in Nazi-occupied Latvia.[16] This it was. Thus, the respondent's membership in the LPP placed him under the direction of, and in association with, the government in Nazi-occupied Latvia, thereby satisfying the section 241(a)(19)(B) component.

Based upon the foregoing, we find that the first element of deportability under both prongs (A) and (B) of section 241(a)(19) has been established.

(2) *The Persecution of any Person*

In order to properly construe the meaning and application of the term "persecution" in section 241(a)(19), it is necessary first to refer to its legislative history. The deportation provisions of section 241(a)(19), together with section 212(a)(33) and other related provisions, were added to the Immigration and Nationality Act in 1978

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[16] The statute appears to establish an irrebuttable presumption that specified persecution carried out in connection with any government in occupied Nazi territory was ultimately accomplished on behalf of the Nazis, or at least was substantially equivalent thereto and so warrants the same condemnation and consequences under the Act.

by the so-called "Holtzman Amendment," Pub. L. 95-549, 92 Stat. 2065. The expressed purpose of the Holtsman Amendment was to eliminate "an undesirable loophole in current United States immigration law" under the Immigration and Nationality Act. H. R. Rep. No. 95-1452, 95th Cong., 2d Sess. 3, *reprinted in* 1978 *U.S. Code Cong. & Ad. News* 4700, 4702. This legislative history noted that most persons who immigrated to the United States after World War II because of being uprooted during that conflict were admitted under authority of the Displaced Persons Act ("DPA") ch. 647, 62 Stat. 1009-1014 (1948) or the Refugee Relief Act of 1953. Both contained prohibitions on the entry of aliens who had been involved in Nazi persecution. Such persons who entered the United States in violation of those prohibitions were (and are) subject to deportation. However, Congress was concerned that since the Immigration and Nationality Act contained no similar provisions excluding persons who had been involved in Nazi persecution, such persons who entered the United States pursuant to the Act were not subject to deportation. *Ibid.* Accordingly, the Holtzman Amendment was intended to close this loophole and render such persons excludable and deportable.

In its consideration of the Holtzman Amendment, Congress recognized that the existing Immigration and Nationality Act contained no express definition of the term "persecution," *id.* at 4704, and it thoroughly explored the merits "of including in the bill a definition of the phrase 'persecution.' Such inclusion was deemed unnecessary in light of the substantial body of preceden[t] already discussed and the success achieved in administering current Immigration and Nationality Act provisions, such as sections 203(a)(7) [now section 101(a)

(42)(A)] and 243(h), without the benefit of an express definition." *Id.* at 4705. The Congressional report then observed:

> Generally this case law has described persecution as the infliction of suffering or harm, under government sanction, upon persons who differ in a way regarded as offensive (*e.g.*, race, religion, political opinion, etc.), in a manner condemned by civilized governments. The harm or suffering need not be [only] physical, but may take other forms, such as the deliberate imposition of severe economic disadvantage or the deprivation of liberty, food, housing, employment or other essentials of life.

Id. at 4704. It concluded that,

> In applying the "persecution" provisions of the bill, it is the intention of the committee that determinations be made on a case-by-case basis in accordance with the case law that has developed under the INA sections heretofore cited, as well as international material on the subject such as the opinions of the Nuremberg tribunals.

Id. at 4706.

As indicated by the legislative history, "deprivation of liberty" clearly was considered to be one possible manifestation of "persecution." Persecution encompasses both "physical" and "mental" aspects. *See United States v. Osidach, supra*, n. 2, at 98-99; *Kovac v. INS*, 407 F.2d 102, 106-107 and n. 9 (9th Cir. 1969); H. R. Rep. No. 745, 89th Cong., 1st Sess. 22, (August 6, 1965). "Physical persecution" generally has been interpreted to include at least "confinement, torture or death inflicted on account of race, religion, or political opinion." *Blazina v. Bouchard,*

286 F.2d 507, 511 (3d Cir. 1961). Moreover, the *Handbook on Procedures and Criteria for Determining Refugee Status*, § 51 (1979), published by the Office of the United Nations High Commissioner for Refugees, states that pursuant to the United Nations 1951 Convention and 1967 Protocol relating to the status of refugees, "a threat to life or freedom on account of race, religion, nationality, political opinion or membership of a particular social group is always persecution." And, in the Refugee Act of 1980, Congress amended section 243(h) of the Immigration and Nationality Act to provide for withholding of deportation where an "alien's life or freedom would be threatened." This was not intended to effect any substantive change in law but merely to incorporate the language of the United Nations Convention and Protocol into the statute. *See Matter of McMullen*, 17 I&N Dec. 542, 545 (BIA 1980); *see also Rejaie v. INS*, 691 F.2d 139 (3d Cir. 1982).

Bearing in mind the foregoing standards and criteria for assessing what constitutes persecution under the Act, the undisputed facts here are that those persons who were objects of LPP investigation, arrest, and interrogation were routinely deprived of their liberty and incarcerated for various lengths of time. The record also demonstrates that RCP prisoners were commonly subjected to various forms of brutal mistreatment. The several eyewitnesses who were prisoners at RCP testified that they and/or their fellow prisoners were frequently beaten severely with fists and clubs during interrogations, while some witnesses also told of being taken to concentration camps or spoke of other prisoners who were killed or taken to concentration camps. *See* p. 13, *supra*. LPP officer Salminsh testified that physical influence often was used in interrogating prisoners at RCP. He also acknowledged that some prisoners were

sent to concentration camps or killed. *See* p. 15, *supra*. The respondent himself admitted to hitting prisoners with his hands during interrogations, and did not deny that the mistreatment previously described was inflicted upon RCP prisoners by others.

This incarceration and infliction of brutal mistreatment or even death described above clearly establishes that those objects of LPP activity imprisoned at RCP were subjected to persecution. Thus, the second element of the statute is satisfied. Accordingly, we turn next to an examination of whether those persons were persecuted because of their political opinion.

(3) *Persecution Because of Political Opinion*

In addressing the element requiring persecution "because of . . . political opinion" under section 241(a)(19), the respondent first contends that he and the LPP were concerned with only those communists who had taken part in the killings, deportations, and other crimes and betrayals against the Latvian people following the Soviet occupation of Latvia in 1940. He argues that this is not persecution because of political opinion.

We would agree with the respondent's position that the mass murder and forceable deportation of Latvian citizens which apparently took place under the Soviet occupation were clearly criminal in nature, and the efforts by the respondent and the LPP to locate, arrest, and punish those responsible for such crimes constitute prosecution for criminal conduct, not political persecution. The respondent properly points out that the House Judiciary Committee expressly stated in its report on the Holtzman Amendment that it "does not intend that the persecution language of [the Amendment] include general prosecutions for criminal offenses, unless for an offense

which is 'purely political' in nature." H. R. Rep. No. 12509, *supra*, at 5.[17] "It is not political persecution, for instance, to punish for violation of a fairly administered passport law." *Co. olan v. INS*, 559 F.2d 993, 1000 (5th Cir. 1977); *See also Matter of Nagy*, 11 I&N Dec. 888 (BIA 1966); *Matter of Chumpitazi*, 16 I&N Dec. 629, 633-34 (BIA 1978). Nor, for example, does criminal prosecution for misappropriation of funds constitute "persecution." *Matter of Sun*, 11 I&N Dec. 872 (BIA 1966).

It is clear that those persons involved in the mass killings and deportations of Latvian citizens during the Soviet occupation, as well as the spies, saboteurs, and the like who operated in German-occupied Latvia, engaged in criminal conduct of a type which any government is entitled to proscribe and punish. Therefore, we conclude that the efforts of the respondent and the LPP to identify, apprehend, and punish such persons does not in itself constitute persecution because of political opinion.[18]

While prosecution and punishment alone of those who commit crimes is not political persecution, subjecting individuals to imprisonment and other abuses simply because of their political opinion or conduct based thereon

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[17] The United Nations *Refugee Handbook*, *supra*, paragraphs 84-85, states that, "If the prosecution pertains to a punishable act committed out of political motives, and if the anticipated punishment is in conformity with the general law of the country concerned, this is not 'persecution.'" However, where one is "exposed to excessive or arbitrary punishment for the alleged offense[,] [s]uch punishment will amount to persecution." *See also id.* at paragraph 152.

[18] While punishment of criminal conduct in itself is not persecution, where that punishment entails such things as severe beatings or being sent to a Nazi concentration camp--*i.e.*, is "excessive or arbitrary"--and is motivated by one of the specified grounds, such punishment would constitute persecution under the Act. *See* n. 17, *supra*.

which is *not* of a criminal nature does constitute persecution under the Act. The record establishes that the actions of the respondent and the LPP were directed not only at suspected communist criminals (such as witnesses Berzins and Engelis--*see* p. 11 *supra*) but also at those who were simply communist sympathizers, Party members, and others engaged in *non*-criminal activities. In other words, they sought to apprehend all communists in general.

We have already set forth our finding that the LPP was intimately connected with and under the direction of the German E.K.-2. Inasmuch as the record shows that the E.K.-2 was involved in "combatting" all communists, and that its Latvian counterpart, the LPP, was used to accomplish the goals of the E.K.-2, it is apparent that the LPP also participated in the persecution of communists. For example, a principal Nazi policy in occupied Latvia was the combatting of "political enemies" --communists, Jews, and other suspected Nazi opponents. *See* p. 4, *supra*. General Stahlecker emphasized that the "top priority in the work of the [German] Security Police . . . was the fight against Communism and Judaism." Exh. G-28 at 12. To carry out this priority, the *Einsatzkommandos* and *Einsatzgruppen* contained section "IV (A)" which dealt with Communists, and section "IV(B)" which dealt with Jews." *See* p. 5 *supra*. The general purpose of the Latvian Auxiliary Police was to accomplish the aims of the Nazis, and the particular role of the LPP was to arrest communists, Jews, and other Nazi "political opponents" as an adjunct to the E.K.-2. *See* p. 8 *supra*. The primary goal of these indigenous Latvian police was "to eliminate those elements who tried to hide their Communist beliefs." *Ibid*. It also appears that after at least the autumn of 1941, the LPP dealt mostly, if not exclusively, with communists. *See* pp. 8-9 *supra*. This and the other evidence of record, while making occasional

reference to the pursuit of communists who engaged in criminal acts, ordinarily refers simply to the pursuit of communists generally, making no distinction as to the particular "type" of communist. Typical is General Stahlecker's comment just cited that they sought to eliminate all those who tried to hide their Communist *beliefs*.

In addition to the foregoing, the individual testimonies of the various eye-witnesses and the respondent himself also show that the LPP persecuted all types of communists. Striguns became an informer for the LPP, identifying persons who were communists. He stated that the role of the LPP was to liquidate the Communist Party and all other groups that were against the German Order. *See* p. 14, *supra*. Former LPP officer Salminsh emphasized that the LPP dealt only with Soviet/communist sympathizers and supporters (not Jews). *See* p. 16, *supra*.

In his own testimony, the respondent preferred to focus on his activities with communist spies, saboteurs, paratroopers, and those who were criminals during the time of the Soviet occupation. However, the respondent also testified that he worked for the LPP investigating "*all kinds* of communists," and stated that the role of the LPP was to pursue communists who remained in Latvia after the Soviet retreat and German occupation. *See* p. 20, *supra*. He also noted that suspected communists and Communist Party members were imprisoned at RCP. *See* p. 22, *supra*. And, he implicitly acknowledged that even people who merely held political opinions in support of communism were imprisoned at RCP as well. *See* pp. 21-22 and n. 14, *supra*.

The testimony of the several former prisoners at RCP also shows that political criminals were not the only type of communists imprisoned at RCP by the LPP.

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Edwards Virsis was imprisoned for over one year at RCP because he was suspected of being "pro-Soviet." Edgars Rode was an athletics inspector on a government sports committee during the Soviet occupation of Latvia. There is no suggestion whatsoever that, as an athletics inspector, Rode was in any way involved in inflicting harm or violence on Latvians. Yet, he was imprisoned for approximately one and one-half years. Rode also testified that his fellow prisoners at RCP were held because they were Soviet sympathizers. Prisoner Carlis Smekerstans was released from RCP to work near a concentration camp upon the condition that he have nothing to do with communists, Jews, or any political activities. Nikolays Endelis was imprisoned at RCP and Salaspils concentration camp for approximately three years because he had been an "activist" and a "Stakhanovist"--working at his bicycle factory to simplify and improve their production methods. Again, there is no indication that these activities were in any way criminal. He also testified that among the prisoners at RCP were Komsomol members.[19] Karlis Zvirgzds also was imprisoned at RCP and Salaspils concentration camp for three years. He had been a rural farmer and head of the local agricultural committee. He was arrested as a suspected Communist Party member and Soviet sympathizer, and was interrogated by the LPP as to whether he was a communist or Komsomol member. Juris Beikmanis was a Latvian farmer and communist activist who was a prisoner at RCP for several months. He testified that his fellow prisoners were held because they

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[19] Komsomol members are described in this record as persons who provided Latvian youngsters with training, indoctrination, and socialization to become model Soviet-communist citizens--which activities clearly do not rise to the level of criminal conduct.

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were communist activist, giving as one example a prisoner who had been a local Party organizer. RCP prisoner Janis Otto Ignats testified that his fellow prisoners were political offenders, including Communist Party members, Komsomol members, Young Communist League members, comm. ist activists, and trade union members, as well as forme Red Guards and militiamen. He defined "activists" as those involved with sports or cultural work.

Based upon the foregoing, we are satisfied that the LPP assisted and participated in the persecution of persons not only because of criminal conduct but also because of their communist political opinions, sympathies, or activities stemming therefrom which were not of a criminal nature. Party organizers, trade unionists, members of communist agricultural or sports groups and committees, educators of youth in communist beliefs, Communist Party members, or Soviet/communist sympathizers are not intrinsically criminals. Yet, it was these very people who were among those jailed and brutally mistreated at RCP and with whom the respondent and the LPP were involved. Therefore, we find that the third element of section 241(a)(19), persecution "because of political opinion," is established.

The respondent has attempted to avoid an affirmative finding on this issue by contending that communism is not an included form of "political opinion" under the Holtzman Amendment. The respondent acknowledges that communism is a political opinion and that under a literal reading of section 241(a)(19), persecution of communists comes within the scope of the statute. App. Br. at 237. However, he asserts that the statute must be interpreted in a manner consistent with the overall intent of the immigration laws; therefore, he urges that it would be "contradictory for Congress, on

the one hand, to enact immigration statutes that are, in every respect, discriminatory against communists and then, on the other hand, to deport individuals based on their efforts to resist communism." *Id.* at 238-39. We find this argument to be without merit.

It is true that under present and past immigration law, communist aliens generally have been subject to exclusion and deportation from the United States. Nevertheless, the failure of Congress to extend its *hospitality* to communists in the United States in no way demonstrates that it condones and approves of those who engage in the *persecution* of communists. We see nothing "contradictory" in the conclusion that persons who have been involved in Nazi persecution--regardless of how unfavorably the particular persecution victims might be viewed--are undesirable and unworthy to enjoy the hospitality of the United States. For example, although the DPA precluded communists from eligibility as "displaced persons," at the same time it also denied such eligibility to anyone who had persecuted "civilians" generally, without restriction. There was no expressed intent to exclude communists from the all-encompassing term "civilians." Similarly, section 241(a)(19) is clear and unambiguous on its face. It refers to the persecution of "any person" because of his "political opinion." Again, there is no expression of intent to exclude communists from the all-encompassing terms "any person" and "political opinion." In other sections of the Immigration and Nationality Act and previous statutes, Congress has demonstrated its ability to draft provisions with specific reference to communists where it deemed necessary. Therefore, its failure to specifically reference and exclude communists from the class of persons persecuted under section 241(a)(19) and related provisions of the Holtzman Amendment demonstrates that Congress intended no

distinction between communism and any other type of political beliefs for purposes of the Amendment.[20] There is nothing to suggest that anything other than a literal reading of its provisions is appropriate. Accordingly, we conclude that under section 241(a)(19), communism is an included form of "political opinion" and that those who are involved with the specified persecution of communists are deportable under the statute.

We would add that our role is to interpret and apply the statute as it is written, not to fashion distinctions and exclusions based upon alleged "policy considerations." Statutory drafting and policy making are the realm of the Congress. If the respondent believes that the broad scope expressed by the terms of the Holtzman Amendment was unintended by Congress or is otherwise inappropriate, then his recourse is to seek Congressional enactment of suitable limitations. We are charged with administering the existing statute, whose plain meaning encompasses all political opinion, including communism. Therefore, the respondent's proposed modifications in the name of statutory construction is unwarranted.

In view of all the above, we conclude that communism is included within the term "political opinion" under the statute and that the actions of the respondent, the LPP, and the E.K.-2 were directed, at least in part, against persons solely because of their political opinion.

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[20] We note too, for example, that in applying the persecution provisions of sections 101(1)(42), 208, and 243(h) of the Act in one recent case, we observed that even where an alien's persecution claim is based upon his Marxist-communist beliefs, this does not disqualify him for relief under the statute. *See Matter of Marroquin*, A19 870 798 (BIA March 23, 1982) n. 9, *aff'd sub nom., Marroquin-Manriquez v. INS*, 699 F.2d 129 (3d Cir. 1983) (appendix).

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(4) *Assisted or Otherwise Participated in Persecution*

The foregoing discussion relating to the first three elements of the statute demonstrates that the respondent was under the direction of, and associated with, the Nazi German Government and an arm of the government of occupied Latvia--the LPP--and that they engaged in persecution because of political opinion. The only remaining element which must be satisfied in order to establish the respondent's deportability under section 241(a)(19) is that requiring that he "assisted or otherwise participated in" this persecution.

The respondent argues that the issue of whether he assisted or participated in the persecution of communists requires that the Government prove the reasons and motivations for his actions and those of the LPP. *See* App. Br. at 194-95, 236, 243, 245. It is his contention that he and the LPP were motivated by considerations of patriotism, morality, and justice in seeking out and punishing the communist "traitors" of Latvia.[21] His argument suggests that his purpose was not to aid Nazi persecution, and that it would be unfair to find him deportable simply because his enemies--the enemies of all patriotic Latvians--were coincidentally Nazi enemies as well. In essence, the respondent urges that he be exempted from application of the statute because his intent was pure. For the reasons which follow, we find that the respondent's motivations and intent are irrelevant for purposes of section 241(a)(19) of the Act.

There apparently is no administrative or judicial case law construing the term "assisted" in proceedings under section 241(1)(19). However, in *Fedorenko v. United States*, 449 U.S. 490 (1981), the Supreme Court had

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[21] We have already rejected the respondent's claim that he and the LPP dealt only with communist criminals.

occasion to construe the same term as used in section 2(a) of the DPA, whose definition of "displaced persons" specifically excluded individuals who had "assisted" the enemy in persecuting civilians. *Id.* at 495, 509-10. The Supreme Court was confronted with a construction by the District Court which imposed a "voluntariness" requirement in connection with the "assisted" term--an attempt to engraft into it an "intent" element such as the respondent would have us do here. The Court concluded:

> Because we are unable to find any basis for an "involuntary assistance" exception in the language of § 2(a), we conclude that the District Court's construction of the Act was incorrect. The plain language of the Act mandates precisely the literal interpretation that the District Court rejected: an individual's service as a concentration camp armed guard--whether voluntary or involuntary--made him ineligible for a visa. That Congress was perfectly capable of adopting a "voluntariness" limitation where it felt that one was necessary is plain from comparing § 2(a) with § 2(b) which excludes only those individuals who "*voluntarily* assisted the enemy forces . . . in their operations . . . ." Under traditional principles of statutory construction, the deliberate omission of the word "voluntary" from § 2(a) compels the conclusion that the statute made *all* those who assisted in the persecution of civilians ineligible for visas.

Id. at 512. We believe the same principle applies in this case as well.

Section 241(a)(19) and other provisions of the Holtzman Amendment contain no reference whatsoever to an alien's motivations and intent behind his assistance or

participation in the specified persecution. On the other hand, Congress has qualified certain other provisions of the Immigration and Nationality Act with an intent element. *See, e.g.*, sections 212(a)(19); 212(a)(31); 215(a)(2), (3), (4), (5), and (7); 241(a)(6)(G); 241(a)(13), 257, 266(a), (c) and (d); 274; 275(3); 277. Moreover, the legislative history of the Holtzman Amendment (discussed earlier) shows that Congress carefully examined prior statutes relating to persons who engaged in persecution. Among these, for example, was the DPA, in which Congress also showed that it was capable of incorporating or omitting an intent/voluntariness requirement as it deemed appropriate. This demonstrates that Congress also knew how to incorporate a motivation/intent requirement in the Holtsman Amendment, yet it chose not to do so. Therefore, as in *Fedorenko*, we find that the plain language of the Amendment mandates a literal interpretation, and that the omission of an intent element compels the conclusion that section 241(a)(19) makes *all* those who assisted in the specified persecution deportable. Thus, the respondent's particular motivations or intent for his alleged assistance and participation in persecution is not a relevant factor.

The respondent's attempt to engraft an intent element into the statute would seem to stem from his perception of a possible problem of over-inclusiveness resulting from a literal interpretation of its terms. However, as the Supreme Court noted in *Fedorenko*:

> The solution to the problem perceived . . . lies not in "interpreting" the Act to include a voluntariness [or "intent"] requirement that the statute itself does not impose, but in *focusing on whether particular conduct can be considered assisting in the persecution* of civilians. Thus, an individual who did no more than cut the hair of female

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> inmates before they were executed cannot be found to have assisted in the persecution of civilians. On the other hand, there can be no question that a guard who was issued a uniform and armed with a rifle and a pistol, who was paid a stipend and was regularly allowed to leave the concentration camp to visit a nearby village, and who admitted to shooting at escaping inmates on orders from the commandant of the camp, fits within the statutory language about persons who assisted in the persecution of civilians. Other cases may present more difficult line-drawing problems but we need decide only this case.

Id. at n. 34. (Emphasis supplied). Following this lead, we reject the respondent's argument that his motivations should be considered, and we proceed to examine carefully whether his particular conduct can be considered as having "assisted" the LPP and/or the Nazis in the persecution of communists. In so doing, we look not to the respondent's subjective intent, but, rather, to the *objective effect* of his actions in deciding whether he assisted in the specified persecution.

On the facts of this case, we have little difficulty in concluding that the respondent did assist and otherwise participated in persecution by the LPP and the E.K.-2 because of political opinion. The following summary, principally of the respondent's own testimony, when viewed in the general context of information provided by other evidence and witnesses, clearly shows the role he played in persecution. The respondent worked as an investigator for the LPP, investigating "all kinds of communists" and exposing the communists who remained in Latvia after the German occupation. As an investigator, he obtained information about suspected communists which could lead to their arrest and

imprisonment at RCP. He sometimes was authorized to decide when to make an actual arrest as well. The respondent also regularly interrogated communist prisoners from and at RCP. The information he obtained was used by his superiors to decide the fate of those prisoners. Such fate could include being sent to a concentration camp or being killed. These decisions were largely based on the "protocols" which he prepared following the interrogations. The respondent was a full-time, paid investigator of the LPP who was always armed. The respondent's immediate superior was one of the three or four section chiefs in the LPP who themselves were directly subordinate to LPP chief Teidemanis. This shows that the respondent's position in the LPP hierarchy was a lofty one, with but a handful of men higher in the organization. The very fact that he was personally interviewed by E.K.-2 chief Lange upon his resignation from the LPP demonstrates that his role in the LPP was not an unimportant one. Even his discharge certificate bears witness to the significant service he had provided to the Germans.

From the above, the respondent's assistance and participation in the LPP-Nazi persecution is clear. His role as an investigator and interrogator of communists of all kinds made him a necessary link between the LPP or E.K.-2 and the objects of their persecution. His efforts provided a vital skill in carrying out their policies. This is quite similar to the situation in *United States v. Osidach, supra,* n. 2, at 98, where Osidach's role as a full-time, paid, and armed interpreter for the indigenous Ukrainian police units and Nazi Police was likewise held to constitute assistance of persecution because he provided a necessary link in the persecution chain. If anything, the respondent's role as a full-fledged officer in the LPP who personally conducted investigations of

communist suspects, questioning of witnesses, and interrogations of communist prisoners, presents an even stronger case of assistance than in *Osidach*. We conclude that the respondent did assist in the specified persecution. Thus, this fourth and last element of the statute is satisfied.

In view of all the foregoing, we find that the record establishes by clear, convincing, and unequivocal evidence that from 1941 to 1943, under the direction of, and in association with, both the LPP--an arm of the government of Nazi-occupied Latvia--and the Nazi German government, the respondent assisted and otherwise participated in the persecution of persons because of political opinion. Therefore, the respondent is deportable under section 241(a)(19) of the Act.

OTHER FORMS OF RELIEF

In the event that he were to be found deportable, the respondent made application for suspension of deportation under section 241(a)(1) of the Act, 8 U.S.C. 1254(a)(1), and, in the alternative, voluntary departure in lieu of deportation under section 244(e) of the Act. However, section 244(e), as amended by the 1978 Holtzman Amendment, precludes granting voluntary departure to aliens who are deportable under section 241(a)(19). Similarly, section 244(a)(1), as amended by Pub. L. 97-116, § 18(h)(2), 95 Stat. 1611 (December 29, 1981), precludes granting suspension of deportation to aliens deportable under section 241(a)(19). Therefore, the respondent is ineligible for both suspension and voluntary departure relief, and those applications accordingly are denied.

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CONCLUSION

In summary, by virtue of the respondent's role and actions as an investigator and interrogator for the LPP, he thereby assisted in the persecution of persons because of political opinion as specified in section 241(a)(19) of the Act, and is therefore deportable on that basis. This finding makes it unnecessary for us to address the charge of deportability under section 241(a)(1). The respondent is also ineligible for relief under section 244 (a)(1) and (e) of the Act. Inasmuch as the immigration judge ordered these proceedings terminated, that order will be vacated, and the Government's appeal based upon the charge under section 241(a)(19) will be sustained.

ORDER: The decision of the immigration judge ordering the proceedings terminated is vacated, and the appeal is sustained.

FURTHER ORDER: The respondent shall be deported from the United States to Chile.[22]

Chairman

BRL:dlm

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[22] In the event he were ordered deported, the respondent designated Chile--his country of citizenship--as the country to which he be deported. Tr. at 1121.

Appendix H

Matter of Laipenieks, Decision of the Immigration Judge, Dated June 9, 1982

UNITED STATES DEPARTMENT OF JUSTICE
UNITED STATES IMMIGRATION COURT

File: A11 937 435—San Diego, California June 9, 1982

In the Matter of EDGARS LAIPENIEKS,
a/k/a EDGARS LAIPNIEKS,
a/k/a EDGARS LAPNIEKS,

RESPONDENT.

IN DEPORTATION PROCEEDINGS

CHARGE:

Act of 1952—Section 241(a)(1) of the Act [8 U.S.C. 1251 (a)(1)]—Excludable at entry under Section 212 (a)(19) of the Act [8 U.S.C. 1182(a)(19)]—Secured visa by fraud or misrepresentation of a material fact.

Act of 1952—Section 241(a)(19) of the Act [8 U.S.C. 1251(a)(19)]—Ordered, incited, assisted or otherwise participated in persecution of persons because of race, religion, national origin, or political opinion, in association with the Nazi government, or government in any area occupied by the Nazi government, or established with the assistance or cooperation of the Nazi government, or ally of the Nazi government, during the period of March 23, 1933 to May 8, 1945.

APPLICATION: Termination of proceedings.

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Matter of Laipenieks,
Decision of the Immigration Judge, Dated June 9, 1982

ON BEHALF OF RESPONDENT:
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INTRODUCTION

The United States of America commenced the instant action pursuant to Section 242 of the Immigration and Nationality Act of 1952, as amended, 8 U.S.C. 1252, to deport the respondent, EDGARS LAIPENIEKS. The trial was held during the period January 26, 1982 to February 18, 1982. This case hinges on the Government's allegations that the respondent by fraud and by willfully misrepresenting material facts obtained his immigrant visa in 1960. It also deals with the Government's assertion that during World War II the respondent had been an active and voluntary member of the Nazi directed or associated Latvian Auxiliary Police, and in that capacity had persecuted persons detained in prison by using harsh interrogation methods.

In *Woodby v. INS*, 385 U.S. 276 (1966), the Supreme Court articulated the proof required to support an order of deportation. The opinion states:

> To be sure, a deportation proceeding is not a criminal prosecution. *Harisiades v. Shaughnessy*, 342 U.S. 580. But it does not syllogistically follow that a person may be banished from this country upon no higher degree of proof than applies in a

negligence case. This Court has not closed its eyes to the drastic deprivations that may follow when a resident of this country is compelled by our Government to forsake all the bonds formed here and go to a foreign land where he often has no contemporary identification. In words apposite to the question before us, we have spoken of "the solidity of proof that is required for a judgment entailing the consequences of deportation, particularly in the case of an old man who has lived in this country for 40 years . . ." *Rowal.t v. Perfetto*, 355 U.S. 115, 120.

In denaturalization cases, the Court has required the Government to establish its allegations by clear, unequivocal and convincing evidence. The same burden has been imposed in expatriation cases. That standard of proof is no stranger to the civil law.

No less a burden of proof is appropriate in deportation proceedings. The immediate hardship of deportation is often greater than that inflicted by denaturalization, which does not, immediately at least, result in expulsion from our shores. And many resident aliens have lived in this country longer and established stronger family, social, and economic ties here than some who have become naturalized citizens.

We hold that no deportation order may be entered unless it is found by clear, unequivocal and convincing evidence that the facts alleged as grounds for deportation are true. . . (footnotes omitted.)

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After considering the record, the Court has concluded that the Government's proof falls short of establishing by clear, unequivocal and convincing evidence[1] as required by *Woodby* at 8 C.F.R. 242.14(a) that the respondent obtained his immigrant visa by fraud or by willfully misrepresenting material facts. The Court further concludes that the Government has not established by the necessary proof that the respondent ordered, incited, assisted, or otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion under the direction of, or in association with, the Nazi government of Germany. Therefore, the charges are dismissed and the deportation proceedings are terminated.

HISTORICAL BACKGROUND

The alleged events that led to the issuance of the Order to Show Cause took place for the most part in 1941 and 1942 during World War II in Riga, Latvia. Latvia is one of the Baltic states situated on the east shore of the Baltic Sea. The 25,000 square mile territory of Latvia

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[1] CLEAR AND CONVINCING PROOF. Generally, this phrase and its numerous variations mean proof beyond a reasonable, i.e., a well-founded doubt. *Southwestern Bell Telephone Co. v. City of San Antonio, Tex.*, D.C.Tex., 4 F.Supp. 570, 573. Some cases give a less rigorous, but somewhat uncertain, meaning, viz., more than a preponderance but less than is required in a criminal case. *O'Briant v. Lee*, 212 N.C. 793, 195 S.E. 15, 20 . . . . *Black's Law Dictionary* (Revised 4th Edn), p. 317.

UNEQUIVOCAL. Clear; plain; capable of being understood in only one way, or as clearly demonstrated; free from uncertainty, or without doubt; and, when used with reference to the burden of proof, it implies proof of the highest possible character and it imports proof of the nature of mathematical certainty. *Berry v. Maywood Mut. Water Co. No. 1*, 11 Cal.App.2d 479, 53 P.2d 1932; *Molyneux v. Twin Falls Canal Co.*, 54 Idaho 619, 35 P.2d 651, 656, 94 A.L.R. 1264. *Black's Law Dictionary* (Revised 4th Ed.), p. 1698.

was, during its independence between 1919 and 1940, inhabited by some two million people. North of Latvia is Estonia, to the south is Lithuania, while the east borders on the Soviet Union. To the west, across the Baltic Sea, is Sweden.

Latvia first came under complete Russian rule during the eighteenth century. During World War I, the Russian empire collapsed and Latvia proclaimed its independence. This was culminated in success when a peace treaty was signed with the Soviet Union on August 11, 1920. Latvia remained free until June 1940 when the Soviet Union once again imposed its rule and occupied Latvia and the other Baltic States. During August of the same year a special session of the Supreme Soviet declared Latvia a Soviet Socialist Republic. This Soviet control was accompanied by harsh measures and violent purges to rebuff those Latvians who asserted ethnic and national identification. Thousands of Latvians were deported to Siberia. Countless other Latvians were killed. In June 1941 Germany invaded the Baltic states, forced the Russian troops out of Latvia, and quickly drove to Leningrad where the war front stabilized. An occupied government was established in Latvia by the Germans. Latvia remained under German rule from 1941 until the German Army was defeated and driven out of the Baltic States by Russia in 1945. After the defeat of Germany, Soviet Russia once more annexed the three Baltic nations. However, the United States has never recognized the legitimacy of the Soviet annexation.[2] The principal events alleged in the Order to Show Cause took place in 1941 and 1942 at the Riga central prison and the Riga

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[2] *See generally:* Berzins, *Alfreds-The Unpu.ished Crime* (1963); Alan Clark, *Barbarossa-The Russian-German Conflict, 1941-45* (1965), *Times Atlas of World History, 144* (2d ed. 1979); *Country Reports on Human Rights Practices for 1979*, 689, U.S. Department of State (1980).

police headquarters during the last German occupation of Latvia.

THE ALLEGATIONS OF DEPORTABILITY

The Government's thirteen-count Order to Show Cause, as amended (*Exhibits G-A and G-B*)[3] charged that the respondent was a native of Latvia and a citizen of Chile who entered the United States at Miami, Florida on March 9, 1960. It alleged that he was admitted for permanent residence under Section 221 of the Immigration and Nationality Act ("the Act"), 8 U.S.C. 1201, upon presentation of an immigrant visa issued on March 1, 1960 at Santiago, Chile.

He was charged with having obtained his immigrant visa by fraud and by willfilly misrepresenting material facts. It was alleged that he had concealed information regarding his occupation and activities as a member of the Latvian Auxiliary Police[4] from July 1941 to August 1943. It was also alleged that he failed to disclose that between 1946 and 1947 he was sought and detained in France in connection with his occupation and activities as a voluntary member of the Latvian Auxiliary Police. It was further alleged that he suppressed facts about his arrest and conviction in 1946 at or near Innsbruck, Austria by an Intermediate Tribunal of the French Military Government of Austria, on the charges of possession of arms and complicity in the possession of arms. He was charged with deportability under Section 241(a)(1) of the Act, 8 U.S.C. 1251(a)(1), in that at the

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[3] The Government's exhibits are designated by a "G". The Respondent's exhibits are designated by an "R".

[4] The Latvian Auxiliary Police is occasionally referred to in the record as the Latvian Political Section, the Latvian Political Police or the Latvian Security Police.

time of his entry he was excludable under Section 212(a)(19) of the Act, 8 U.S.C. 1182(a)(19).[5]

The Order to Show Cause also accused the respondent in broad general terms with having participated in the persecution of persons because of race, religion, national origin, or political opinion as a member of the Latvian Auxiliary Police. It was asserted that the Latvian Auxiliary Police was an organization under the direction of and associated with the Nazi government of Germany. Other allegations are that while on duty at the Riga police headquarters[6] he participated in the beating of one of more unarmed prisoners or arrestees. It was also alleged that at the Riga central prison he participated in acts of physical brutality against unarmed inmates and in the killing of unarmed inmates. He was also charged

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[5] Section 241(a)(1) of the Act, 8 U.S.C. 1251(a)(1), provides as follows:

> (a) Any alien in the United States . . . shall upon the order of the Attorney General, be deported who—
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> (1) at the time of entry was within one or more classes of aliens excludable by the law existing at the time of such entry.

Section 212(a)(19) of the Act, 8 U.S.C. 1182(a)(19), provides as follows:

> (a) Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:
>
> (19) Any alien who seeks to procure, or has sought to procure, or has procured a visa or other documentation, or seeks to enter the United States, by fraud, or by willfully misrepresenting a material fact.

[6] The Riga police headquarters is frequently referred to as Prefectura or Prefecture.

with deportability under Section 241(a)(19) of the Act, 8 U.S.C. 1251(a)(19).[7]

SUMMARY OF TESTIMONY

The Government's first charge is that the respondent obtained his immigrant visa by fraud and by willfully misrepresenting or suppressing material facts because on his visa application (*Exhibit G-1A*) he failed to reveal (1) that he had been an investigator for the Latvian Auxiliary Police from July 1941 to August 1943, (2) that he had been sought and detained in 1946 and 1947 by agents of the French Government in connection with his occupation and activities from July 1941 to August 1943, and (3) that he had been arrested and convicted in 1946 at or near Innsbruck, Austria by an Intermediate Tribunal of the French Military Government of Austria on the charges of possession of arms and complicity in the possession of arms.

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[7] Section 241(a)(19) of the Act, 8 U.S.C. 1251(a)(19), provides as follows:

> (a) Any alien in the United States . . . shall, upon the order of the Attorney General, be deported who—
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> (19) during the period beginning on March 28, 1933, and ending on May 8, 1945, under the direction of, or in association with—
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> (A) the Nazi government of Germany,
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> (B) any government in any area occupied by the military forces of the Nazi government of Germany,
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> (C) any government established with the assistance or cooperation of the Nazi government of Germany, or
>
> (D) any government which was an ally of the Nazi government of Germany,
>
> ordered, incited, assisted, or otherwise participated in the persecution of any person because of race, religion, national origin or political opinion.

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The respondent's application for an immigrant visa and alien registration showing these omissions was made part of the record (*Exhibit G-1A*). One Government witness, William Lawrence Krieg, testified concerning the procedures followed in issuing visas (Tr. p. 364-398). In addition, an affidavit of the visa issuing officer, the deceased Walter E. Kneeland, was made part of the record (*Exhibit G-42*). Evidence was introduced to show that the respondent was sought for questioning by French authorities in 1947 apparently as a result of statements made to French Gendarmerie by Arnolds [sic] Berzins and Edouard [sic] Virsis on or about July 8, 1947 (*Exhibits G-19 and G-19-A*). Both Berzins (Tr. p. 400-467) and Virsis (Tr. p. 563-619) testified at trial. The respondent admitted in a pre-trial 1962 statement (*Exhibit G-55A2, p. 6*) and at trial (Tr. p. 949-954) that he had, in fact, been questioned by French agents at La Havre in 1947 while he and his family were enroute to Chile. Evidence was also introduced establishing that the respondent was arrested and convicted in 1946 on the charges of possession of arms and complicity in the possession of arms (*Exhibits G-21 and G-21-A*).

The Government's second charge is that from July 1941 to August 1943, while Germany occupied Latvia, a person known to the inmates as Laipenieks interrogated, beat, and killed unarmed persons at the Riga police headquarters and at the Riga central prison. Twelve witnesses testified for the Government about these allegations. Nine testified by video taped oral deposition taken in Riga, Latvia, U.S.S.R. and three testified at trial. One witness, Rode, said that he was threatened with a beating by the respondent. Another witness, Virsis, asserted that, upon a signal from the respondent, an armed guard assaulted him. Four witnesses, Engelis, Zvirgzds, Berzins and Virsis claimed that the respondent had beaten them. Two witnesses, Rode, and Maister

testified that they saw the respondent strike fellow prisoners. Several witnesses maintained that inmates of the prison had told them of mistreatment they had suffered at the hands of the respondent. Two witnesses, Striguns and Salminsh, recalled that they had known the respondent and his brother, Miervaldis Laipenieks, when the Laipenieks brothers worked together for the Latvian Auxiliary Police. Many of the witnesses also made identifications of the respondent from a photograph which had been taken from his November 26, 1938 passport VA No 005000 (*Exhibits G-1J and G-1A1(d)*) and from his July 15, 1938 Latvian passport No 006058 P (*Exhibits G-8 and G-8A*) as being the Laipenieks they observed at the Riga police headquarters or at the Riga central prison in 1941 and 1942.

The respondent's rebuttal was that he was simply an investigator employed by a subdivision of the anti-Soviet Latvian Auxiliary Police. He maintained at trial, in 1962 pre-trial statements (*Exhibits G-55A1, G-55A2 and G-55A7*) and in a 1975 pre-trial statement (*Exhibit G-1G*) that after joining the police in July 1941 he was first assigned duties involving the identification, investigation, and interrogation of Communists and Communist sympathizers. Later, his activities were focused on the apprehension of paratroopers and saboteurs from Russia. He readily admitted that he occasionally did strike a prisoner with his hands (Tr. p. 257, 258, 264) (*Exhibit G-55B*). He denied, however, participating in the persecution or mistreatment of any person because of race, religion, national origin or political opinion.

THE DEPOSITION TESTIMONY OF THE GOVERNMENT'S WITNESSES

Edgars Andreivich Rode was one of nine witnesses whose video taped oral deposition was taken in Riga,

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Latvia, U.S.S.R. during November 1981 (*Exhibits G-44, parts 1 and 2; G-44A*). Rode said that while he was detained at the central prison in September 1942, the respondent threatened to beat him. He also said that he saw the respondent beat a person with his fist at the prison. In addition, he recalled a fellow inmate telling him that the respondent had mistreated him. Rode testified that he was born on June 2, 1908 in Latvia and was a citizen of the Soviet Union. At the time of the deposition he was 73 years old. As a young man, he was involved in athletics in Latvia. When Russia occupied Latvia from the summer of 1940 until the summer of 1941 he was a member of a Soviet committee on physical culture and sports. As a sportsman, he saw the respondent on various occasions from 1930 to 1932 or 1934. Rode saw him train and compete in athletic events. The witness saw the respondent again in 1940 during the Soviet rule. About one week after the Germans arrived in Riga in July 1941, the witness was arrested and taken to police headquarters. All of the guards there were Latvians.

Rode testified that in about August 1941, some six weeks after he was arrested, he was transferred to the central prison. He remained there until the end of 1942 when he was released from custody. He was interrogated three or four times at the prison. The first time was in December 1941. He saw the respondent at that time but was questioned by another Latvian for thirty to forty-five minutes. He was questioned for the second time in February or March 1942. His interrogator was a Latvian by the name of Schmit. He was not mistreated either time. His third examination was again by a Latvian during September 1942. Rode said that at this occurrence, the respondent was there and wanted to beat him but was dissuaded from doing so by a guard. The witness also recalled an event that occurred at the time he was first questioned in December 1941. Rode testified that a

person he recognized as Laipenieks was in a cell and was calling persons to be quizzed. There was noise and cries in that area and some of the persons coming from that general direction were badly beaten. The witness remembered that the respondent had called him a ". . . Bolshevik, a Communist, a great Communist or a big Communist, . . ." (*Exhibit G-44A, p. 25, 26*). The witness was questioned for the fourth and last time by a commission of Germans and Latvians in the latter part of 1942, about one month before he was released from prison. He saw the respondent for the final time during 1944 in a street in the city of Riga. The respondent was delivering bread from a cart. There was no conversation exchanged. The witness also testified that he recollected the respondent beating a person with his fist at the central prison. On another occasion he was told by a militia man who had been captured in Estonia that Laipenieks had mistreated him.

At the deposition Rode proceeded to identify photograph number 6 from a photograph display marked *Exhibit G-44A1* as the man he believed to be Laipenieks. He placed a number "1" and a circle around the head of a person he believed to be the respondent from a photograph of a group of six persons looking at the corpse of a person who had apparently been hung. That photograph was marked *Exhibit G-46A6* in evidence. Rode also identified photograph number "4" as the respondent from some 18 photographs on a photographic display that had been marked Government *Exhibit 3* for identification and attached to the deposition. The witness described the person he knew as Laipenieks as a bit taller and five or six years younger than he was. Later, however, he said that Laipenieks was a bit shorter than he was. Rode could not remember when he was questioned by the Russian Procurator although he was interviewed and made a statement at the Procurator's office on

August 21, 1979 (*Exhibit R-1*), and had first made a statement to the Procurator in 1976. He testified that he was uncertain as to what photographs he had been shown at the earlier examinations and whether the photographs had been loose or affixed to a cardboard.

Janis Edvardovich Engelis is another witness who testified by deposition regarding incidents at the central prison (*Exhibit G-45, parts 1 and 2; G-45A*). Engelis was born on September 4, 1904 and was 77 years old at the time the deposition was taken. Engelis said that while he was detained at the prison in August 1941, the respondent beat and hit him with a truncheon or a piece of rubber, twisted his arm and pulled it out of its socket. He also recalled several of his fellow prisoners complained that the respondent had beaten or otherwise mistreated them. He testified that before the Nazis arrived in Latvia during June 1941 and while that country was under Soviet control, he was the Deputy Chief of an Executive Committee for the Latvian Village of Vidrizi. Although he did not know the respondent personally, he was familiar with his reputation as a sportsman and a politician. He saw him once in Vidrizi in connection with a political event. He had also seen his picture in newspapers on more than one occasion relating to political or sporting activities.

Engelis testified that he was arrested by the local police on July 14, 1941 soon after the German army arrived in Latvia. On July 16, 1941 he was sent to the central prison and remained there until he was released from custody on September 13, 1941. While at the prison, the witness was interrogated four times by a person he knew as Laipenieks. On the first occasion, the respondent had a pistol and his hands were covered with blood. After washing his hands, the respondent went into another room to smoke. Engelis heard screaming and understood that someone had been beaten in one of the

cells in that area. The second examination took place in August 1941. Only the respondent was there. The respondent accused Engelis of preparing a list during the Soviet occupation of Latvia of persons to be deported to Siberia. He was also accused of being too harsh in looking for weapons, apparently during the time the Russians ruled Latvia. The witness said that he was questioned the third and fourth times on September 13, 1941 by the respondent and a German. On the same day he was released from confinement.

Engelis recalled several persons at the prison complained about the respondent. Santims, Reubenis, and Rasa told him that the respondent had beaten or otherwise mistreated them. The witness understood that Rubenis, a militia man under the Soviet rule, was given a tablet which he thought was poison but which turned out to be harmless. At the deposition, the witness was unable to identify a photograph of the person he knew as Laipenieks from a photograph display marked *Exhibit G-45A1* although he had recognized the respondent from a group of photographs shown to him a few years earlier when he was questioned by the Russian Procurator.

The witness traced his arrest and two months confinement to his activities during the Soviet rule as the Deputy Chief of an Executive Committee in Vidrizi and to a list he was said to have prepared of Latvian persons scheduled for deportation to Siberia.

Carlis Krisjanisovich Smekerstans was another witness who testified by deposition for the Government (*Exhibits G-46, parts 1, 2, and 3 of deposition taken on November 28, 1981 and part 1 of deposition taken on November 29, 1981; G-46A*). Smekerstans said that while he was detained at the central prison from July to November 1941, he saw the respondent twice. He also recalled a fellow inmate complained that the respondent had mistreated him. Smekerstans was born on December 10, 1910 in Riga, Latvia and was 70 years old when the

deposition was taken on November 28, 1981 and November 30, 1981. Smekerstans complained about his health. He had difficulty hearing, his eyesight was gone and his nerves have been damaged (*Exhibit G-46A, p. 10, 52, 65*). As a young man he was a sportsman in Latvia and participated in track and field, basketball and bicycle riding. From 1930 to 1940 he knew the respondent well. They went everywhere together and were friends. He identified the respondent in several group photographs which were marked *Exhibits G-46A1 through and including G-46A4* in evidence. The photographs had been in Smekerstans possession continuously since they were taken. He also identified photograph number 8 as the respondent from a photograph display marked *Exhibit G46A5* in evidence. He recognized the respondent in another photograph of a hanging which was marked *Exhibit G-46A6* in evidence. On other occasions he had difficulty with identifications because, as he stated, his memory was not good (*Exhibit G-46A, p. 58*).

Smekerstans outlined the problems he encountered when the German's occupied Latvia in July 1941. He was arrested by the local Latvian police on July 3, 1941. On July 16, 1941 he was transferred to the central prison. While at the prison, he saw the respondent twice. The first time, the respondent and two other persons came into his cell and the respondent briefly spoke to him and later the witness caught a glimpse of the respondent in a cell block in the area where interrogations took place. The witness also testified that the respondent ". . . interrogated me." (*Exhibit G-46A, p. 58*) but this does not seem to have been the case.

Smekerstans described a beating he received at the prison. He was battered with truncheons, fists and his nose was painfully injured and he was kicked. He traced this incident to a case of mistaken identity. Smekerstans did not, however, claim that the respondent participated

in the beating. The witness did recall two persons detained with him at the prison who had complained about the respondent. Rubenis told Smekerstans that the respondent questioned him and made him swallow a pill which he believed was poison but which actually did him no harm. Parms told Smekerstans that he had been questioned by the same person who examined Rubenis. Smekerstans testified that after the war, he saw an article and a photograph of the hanging in a local newspaper. He went to the Procurator's office and identified the respondent and an Yakovicki as two persons who looked familiar to him in the photograph.

Another witness who testified for the Government by deposition was Nikolays Aleksandrs Endelis (*Exhibits G-47; G-47A*). Endelis said that the respondent had acted as an interpreter when he was questioned by the Germans at the central prison during 1941. He also recalled that a fellow prisoner, Kirhenshteins, told him that the respondent and the Germans had beaten him. Endelis was born in Latvia on September 17, 1915 and was 66 years old at the time the deposition was taken. Before the Nazi occupation of Latvia in July 1941, the witness worked in a bicycle factory making spare parts. He described himself as an activist, a so-called Stakhanovist and made the production of spare parts better and faster. He knew the respondent beginning in 1933 (*Exhibit R-5*) or perhaps in 1937 and 1938 (*Exhibit G-47A, p. 8*). He knew him as a sportsman. Endelis testified that he was arrested on July 6, 1941 in Riga by the local armed Latvian police and some civilians at the factory where he worked. Four or five days later he was sent to the central prison.

Endelis testified that while at the prison, he was interrogated three times. On two occasions, the respondent was present and acted as an interpreter. One of these times he was mistreated by the Germans who beat him in the eye with their fists. The witness did not claim,

however, that the respondent participated in the beating. Endelis did recall one person at the prison, Kirhenshteins, who told the witness that the respondent and the Germans had beaten him. The witness traced his imprisonment to being an activist. Unlike most of the other deponents, he was not asked to identify the respondent from a photographic display, but at the time of the August 20, 1979 interview with the Procurator he apparently did recognize the respondent in a photograph of a hanging scene that had been marked *Exhibit G-46A6* in evidence (*Exhibit R-4*).

Another deposition witness for the Government was Karlis Augustovitch Zvirgzds (*Exhibits G-48; G-48A*). Zvirgzds said that while he was detained at the central prison during August 1941 the respondent beat him, struck him in the back with a rubber truncheon and threatened to shoot him. He also claimed that two fellow inmates at the prison, Taurnish and Gabrans complained that the respondent had mistreated them. The witness was born in Latvia on August 27, 1915 and was 66 years old at the time of the deposition. He first became acquainted with the respondent in 1932 when they were in secondary school together and participated in a sports event. He next saw the respondent at the prison in 1941. The witness was arrested in July 1941 and a few days later was sent to the central prison.

Zvirgzds testified that he was questioned twice at the prison. The first time, during August 1941, the respondent beat him, struck him in the back with a rubber truncheon and threatened to shoot him. The witness recalled the respondent with a pistol in his hand saying, "Shoot this Communist like a dog" (*Exhibit G-48A, p. 34, 35*). He was questioned for the second time in September 1941 by a German in military uniform and an interpreter was present.

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Zvirgzds recalled two fellow prisoners had complained about the respondent. Taurnish said that he was beaten by the respondent and so did Garbrans. Zvirgzds testimony concerning Garbrans was, however, apparently inconsistent with a statement he made to the Procurator on August 16, 1976 when he stated that Garbrans had been beaten by a Latvian whose surname he did not know.

At the deposition Zvirgzds proceeded to identify photographs number 1, 2, and 5 from a photograph display marked *Exhibit G-48A1* as those who reminded him of the person he remembered as Laipenieks. Later he said that photograph number 1 resembled Laipenieks more than the others. Still later he said that Laipenieks was perhaps number 1 but that he could not say for sure.

The next Government's deposition witness was Vladimar Alexandrovich Striguns (*Exhibit G-49, parts 1 and 2; Exhibit G-49A*). Striguns said that he was familiar with the respondent, Edgars Laipenieks and his brother Miervaldis Laipenieks, when the brothers worked together at police headquarters. He described Miervaldis as a heavy drinker, smaller than the respondent, and with a gold tooth in the front of his mouth. Striguns was born on March 25, 1917 in Riga, Latvia and was 64 years old at the time the deposition was taken. In July 1940 he joined the Russian Army and served actively until July 1941 when he was selected to be a member of a partisan brigade assisting the Soviet troops. He was subsequently captured and detained by the Germans in a camp until December 1941 when he was released. He then returned to Riga. He was arrested there by the Latvian police on December 31, 1941. While at police headquarters on January 4, 1942, he was informed that he had been sentenced to death because he had worked clandestinely for the Communist Party during the time of Ulmanis, the former president of Latvia. He was given the option

of either collaborating with the Germans or being shot. After agreeing to be an informant he was released from detention. The witness testified that he thereafter worked as a glazier and later obtained employment in a restaurant.

Striguns testified that while working at the restaurant during the summer of 1942 he met Miervaldis Laipenieks. They drank together several times a week. Miervaldis was a heavy drinker, a drunkard, and was not an athlete. Striguns described Miervaldis as small, blonde, fair hair, on the fair side with broad shoulders and with a gold tooth in the front.

The witness also testified about the respondent. He said that he did not know the respondent personally but was familiar with the name from newspapers and magazines and heard about him as a popular sportsman. He recalled that the respondent and Miervaldis were brothers and had worked together in the same office. He saw the respondent often at police headquarters but Striguns had never seen the respondent in the area where the respondent was working. Nearly everything he knew about the respondent he learned from Miervaldis.

Striguns proceeded to identify photographs number 4 and 6 as looking familiar to him from a photograph display marked *Exhibit G-49A1* in evidence. Finally, he decided that photograph number 4 was Edgars Laipenieks.

The witness also testified about incidents that he connected to the respondent. Once, when he was at the headquarters, he heard horrible screaming. Miervaldis told him that it was coming from an interrogation room where the respondent and some other persons were most of the time. Striguns also remembered Miervaldis telling him that the respondent was going too far, losing a sense of measure and that he was brutal toward the prisoners of war and those he interrogated.

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Janis Otto Ignats was another Government witness who testified by deposition (*Exhibits G-50; G-50A*). Ignats said that while he was detained at the central prison from July 10, 1941 to May 18, 1942 he saw the respondent on one occasion. He also recalled several unpleasant incidents that occurred at the prison. Ignats was born in Liepaja, Latvia, U.S.S.R. in 1911 and was 70 years old at the time the deposition was taken. When the German army invaded Latvia in June 1941, he was serving in a worker's battalion defending the city with the Russians against the German invaders. Soon after the Russian troops retreated, he was taken captive by the Germans and on July 10, 1941 was sent to the central prison. Conditions at the prison were very poor. There were about 60 persons in a cell, sanitary conditions were unsatisfactory and the air was bad. The detainees at the prison were generally accused of being sympathetic to the Soviets and being political enemies of the Nazis.

Ignats testified that soon after he arrived at the prison a person by the name of Laipenieks came into the cell and explained the screening process and the punishment that could be expected. Laipenieks told the group that Communist Party members would be shot or at least sentenced to ten years. Laipenieks had the persons in the cell divide themselves into five groups: trade union, activists, militia, former guards, and Komosol or Communist Party members. This was the only time Ignats saw Laipenieks. The witness testified that Laipenieks had not questioned him, that he had forgotten his face, and that he did not know that Laipenieks had a brother. Ignats was not asked to try to identify the respondent from a photo display as many of the other witnesses were.

Ignats was not mistreated at the prison; however, he did recall several unpleasant incidents that happened there. He testified that he had seen other prisoners who had been beaten as much as one could beat somebody.

He understood two former militia men had been shot. He heard screams and yelling from a cell block, and he had seen a wall that was full of bullet holes. Nevertheless, Ignats did not claim that the respondent had been involved in any of these matters and said that he did not know what Laipenieks job at the prison was. Moreover, although Ignats had been an active member of the Communist Party and had been part of the workers battalion fighting with the Russians resisting the oncoming German Army, Ignats made no claims of being mistreated in any manner at the prison.

Juris Ansis Beikmanis also testified by deposition for the Government (*Exhibits G-51; G-51A*). Beikmanis said that he recalled seeing a person by the name of Laipenieks at the central prison while he was detained there from June until August 29, 1941. He said that he remembered two of his former cell mates at the prison, Rubenis and Engelis, complained that Laipenieks had mistreated them. Beikmanis was born in Minsk, Russia on February 22, 1901 and was nearly 81 years old at the time the deposition was taken on November 26, 1981. He had difficulty remembering events. When Germany invaded Latvia during June 1941 the witness was a farmer, a supplementary militia man, and a Soviet activist. He said that he was arrested during the end of June 1941 for being an activist and was detained in the central prison until August 29, 1941. Beikmanis testified that at the prison there were some 60 persons in the cell with him. He knew 10 of his cell mates including Rubenis, Smekerstans and Engelis. Soon after he arrived at the prison four persons came into the cell and one of the visitors, whom he later learned was Laipenieks, greeted Smekerstans.

Beikmanis also stated that at least two persons at the prison had complained about Laipenieks. Engelis told him that Laipenieks had injured his arm. Engelis

was a witness who also testified for the Government by deposition (see *Exhibit G-45A*). Rubenis told him that Laipenieks had made him swallow a tablet which he thought was poison but which was actually harmless.

At the deposition, the Senior Assistant Procurator questioned Beikmanis. He reminded Beikmanis that on August 11, 1976 he had made a sworn statement or protocol of at least five pages and had not mentioned the Engelis incident. He further reminded the witness that in the protocol the witness had confined his testimony to the event relating to Rubenis who had been forced to take a pill. The witness explained this apparent oversight by saying that after the Procurator's statement was made on August 11, 1976 Engelis had reminded him of the incident but that at the time of the 1976 protocol he had actually forgotten about it. In later testimony Beikmanis first said that he had not spoken to Engelis after the August 11, 1976 protocol (*Exhibit G-51A, p. 42*). In subsequent testimony he admitted that he and Engelis had gotten together after August 11, 1976 and discussed these events (*Exhibit G-51A, p. 43*). Still later, however, he said that he didn't really remember, that he was confused and that his memory was bad (*Exhibit G-51a, p. 42, 43, 46, 50, 51, 53*).

Edgars Christianovich Salminsh was the ninth and final Government witness who testified by video taped deposition in Riga, Latvia, U.S.S.R. (*Exhibits G-52, G-52A*). Salminsh said that he was acquainted with the Laipenieks brothers, Edgars and Miervaldis, when Salminsh worked with them in the Operations Section of the Latvian Auxiliary Police at police headquarters. Salminsh also testified about his knowledge of the duties and responsibilities of the Latvian Auxiliary Police and those who worked in the organization.

Salminsh was born on July 13, 1912 in Talsi, Latvia and at the time the deposition was taken was 69 years

old. When the German troops arrived in Latvia in June 1941 he was living in Riga, Latvia. Following the invasion, the Germans appealed to all those who had served as policemen to come to police headquarters and apply for positions under the German occupied government. He went and accepted an assignment as an investigator or an assistant investigator in the operations section of the Latvian Auxiliary Police. His duties consisted of interrogating prisoners and performing other investigative duties, including a determination as to whether the accused person had made any Latvians perish during the Russian occupation of Latvia from June 1940 until June 1941. It was while working there during July and August 1941 that he met the Laipenieks brothers who were doing the same type of work. He said that there were all kinds of prisoners, including activists, Red Guards, those involved in underground work and persons accused of sheltering Jewish persons. The Latvian Auxiliary Police was not permitted to deal with any matter relating to Jewish persons. The witness testified that there were three separate sections in the Auxiliary Police, i.e., Operations, Investigations, and the Agentur or Secret Service Section. Investigations were assigned to each to interrogate prisoners. The witness recalled that there were a group of some five to eight investigators from the Operational Section who visited the central prison. The Laipenieks brothers were in this group.

Salminsh described Edgars Laipenieks as one meter seventy or one meter and seventy-five in height, not at all corpulent, sportsmanlike bearing, face on the lean side or the thin side and with not too dark nor too light brown hair combed straight back. He remembered the other Laipenieks as smaller in height, with a different facial expression and with roundish cheeks. He said that Miervaldis was one meter sixty-five centimeters, broad

in the shoulders, face more round with lighter hair. He did not wear glasses, had no distinctive features, and did not have false teeth.

The witness testified that he saw the Laipenieks brothers nearly every day, but was never with Edgars Laipenieks when prisoners were interrogated and never observed any inmates after they had been examined by the respondent. He did say, however, that the Laipenieks brothers had a reputation for using physical force. The witness also outlined his knowledge of the duties and responsibilities of the Latvian Auxiliary Police and those who worked in that organization. At the deposition, the witness proceeded to identify photographs number 3 and 8 from a photograph display marked *Exhibit G-52A1* as being the person he remembered as Edgars Laipenieks. Salminsh also testified that after the war, he was tried and punished by the Russians for his activities during the time the Germans occupied Latvia.

THE TRIAL TESTIMONY OF THE GOVERNMENT'S WITNESSES

Six additional witnesses testified for the Government at trial. Three of the witnesses, Dr. Raul Hilberg, William Lawrence Krieg and Gideon Epstein testified as experts. The other three witnesses, Arnold Berzins, Edward Virsis and Ber Maister testified about incidents that occurred at either the Riga police headquarters or the Riga central prison during 1941 and 1942.

Dr. Raul Hilberg, a noted author and historian on the Holocaust, testified about the German policies and the implementation of these policies following the German invasion of Latvia on June 22, 1941 (Tr. p. 277-307, 313-363, 480-547). Hilberg said that Nazi Germany had a program of annihilating the Jewish population and the active members of the Communist Party in the occupied territories. That policy was entrusted in the first instance

to special units of the Reich's security main office known as Einsatzgruppen which were dispatched to the occupied territories specifically for this purpose close upon the heels of the advancing German armies. Einsatzgruppe A, commanded by Stahlecker, was responsible for executing the policy in Estonia, Latvia, Lithuania, Beylo Russia and in certain territories within the Soviet Union. A Subdivision of Einsatzgruppe A was Einsatzkommando 2 (EK 2) headed by Lange which was assigned the task in Latvia. Within a month or two after the arrival of the German army in Latvia, EK 2 was responsible for killing about sixty-five hundred Jewish persons and Communists. Hilberg testified that since EK 2 had only one hundred and seventy members, it had to rely on local facilities to carry out its program. He concluded the indigenous Latvians were expected to carry out German orders in that area (Tr. p. 306, 307). He analyzed and commented at length on the October 15, 1941 report of Stahlecker, commander of Einsatzgruppe A, who reported on the activities and accomplishments of the Einsatzgruppe from June 22, 1941 to October 15, 1941 (Tr. p. 315-335). The Stahlecker report was marked *Exhibit G-28 and G-28A* in evidence.

William Lawrence Krieg was the second expert witness called by the Government (Tr. p. 364-398). Krieg testified concerning the procedures followed in issuing visas to support the Government's claim that the respondent procured a visa by fraud or by willfully misrepresenting a material fact.[8] An affidavit of Walter E. Kneeland was offered for the same purpose (*Exhibit 42*). Krieg was a foreign service officer of the Department of State from 1938 to 1970 and was the Deputy Chief of Mission at the American Embassy in Santiago, Chile on March 9, 1960

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[8] Krieg testified because Kneeland, whjo had issued the respondent an immigrant visa, is deceased (Tr. p. 367, 389).

when the respondent's immigrant visa was issued by that office. An applicant for an immigrant visa completed and submitted a preliminary mimeographed questionnaire in the local language concerning the requirements of the immigration act. The application was reviewed by a consular officer. Later the applicant appeared at the office and a clerk-typist assisted the applicant in filling out the formal application. If a question arose concerning eligibility for a visa, an operational memorandum requesting guidance was prepared and forwarded to the Department of State in Washington, D. C. In Krieg's opinion and based upon his experience as a foreign service officer, a policeman who engaged in persecution of persons because of race, religion, nationality or political opinion would have committed a crime of moral turpitude (Tr. p. 377). In the same vein and without explaining the basis for his action, Kneeland asserted in his affidavit (*Exhibit G-42*) that he would not have issued an immigrant visa to any person who had participated in the persecution of any person because of race, religion, national origin, or political opinion.

Gideon Epstein, a forensic documents examiner and specialist in the examination of questioned documents, was the third expert witness called by the Government (Tr. p. 791-810). Epstein examined two 1942 signatures of Alfreds Sterns on *Exhibit G-9* and compared them with six known signatures of Sterns on *Exhibit G-24A*. He concluded that the 1942 signatures of Sterns on *Exhibit G-9* were authentic and that there was a common authorship of these various signatures (Tr. p. 799-800).[9]

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[9] The deceased Alfreds Sterns was the respondent's immediate supervisor in the Latvian Auxiliary Police most of the time (Tr. p. 287-288). On October 5, 1942, Sterns had ordered that Janis-Arnolds Mikulis-Strumpmanis be arrested and incarcerated at the central prison on the charge of aiding Jews (*Exhibits G-9 and G-9A and Exhibits G-10 and G-10A*).

The witness also authenticated an affidavit he prepared on January 19, 1982 which was marked *Exhibit G-24* in evidence. In the affidavit, Epstein found, as he did at trial, that the Sterns signatures on *Exhibit G-9* were genuine. He had also compared in his affidavit a questioned signature of an "E. Laipeniks" on a 1938 passport (*Exhibit G-8*) with seven of respondent's known signatures [(G-1A, G-1D, G-1E, G-1G, and G-1H)] and decided that the 1938 signature of "E. Laipenieks" in *Exhibit G-8* was also authentic.

Arnold Berzins was one of three witnesses who testified for the Government at trial about incidents that occurred at either the police headquarters or the central prison during 1941 and 1942 (Tr. p. 400-467). Berzins said that while he was detained at police headquarters in May of 1942, the respondent beat him on the head with his fist and a blackjack. He also recalled a fellow prisoner by the name of Apse complained that the respondent had mistreated him.

Berzins was born in Latvia and is now a Canadian citizen. When the German army occupied Latvia he was employed in a textile factory. At the factory he was on a committee locating housing for the workers. He was given the responsibility of contacting some 10 persons on a list to see if spare rooms could be located. This list was the focal point of his problems when he was arrested by the Latvian Auxiliary Police on May 10, 1942. Soon after he was arrested, he was taken to police headquarters and brought into a small room. He was then asked some preliminary questions by a person sitting at a desk. That person then left and came back with another person who was introduced to him as Edgars Laipenieks. Berzins was questioned about the list which was believed to contain the names of Latvians who were scheduled for deportation to Siberia when the Russians occupied Latvia. When Berzins explained that it was a housing list and not a deportation list the person he knew as

Laipenieks accused him of lying, put him against the wall and then started beating him on the head with his fist and a blackjack. The beating continued until Berzins collapsed. This is the only occasion that the witness saw Laipenieks.

Berzins proceeded to describe the person he knew as Laipenieks. He said that he recalled that Laipenieks was in a jacket with black boots, knee length boots and knee length pants like horse riding pants. He was young, had dark hair, a bit shorter than 5'10" and he weighed about seventy kilograms or 154 pounds. The witness identified photograph number 4 from a photograph display marked *Exhibit G-40* in evidence as being the photograph that he had seen at the time of an earlier interview and whom he had recognized as Laipenieks. He also identified *Exhibit G-19* as the statement that he made to the French Secret Police in Reutlingen, Germany on July 8, 1947. He said that he could never forget the face of Laipenieks. Berzins was, however, unable to identify the respondent at trial as the person he remembered as Edgars Laipenieks.

Berzins recalled another incident involving Laipenieks. He testified that a cellmate by the name of Apse returned to the cell they were occupying with a bloodied face, ears and neck. When asked who his interrogator was, Apse said that it was Laipenieks. Berzins also recalled discussing these incidents with Edward Virsis who also testified at trial for the Government. The discussion took place after July 8, 1947, the date he gave his statement to the French Secret Police.

Edward Virsis was another witness who testified for the Government at trial about incidents at the central prison in July and August 1942 (Tr. p. 563-619). Virsis said that while he was detained at the prison, Laipenieks had given a signal and a uniformed guard had hit him, broke his nose, and had beaten him with a blackjack as

he lay on the ground. He also said that two or three weeks later Laipenieks had hit him with a blackjack on the soles of his feet.

Virsis was born in Riga, Latvia on January 9, 1916 and now lives in the United States. He became an American citizen in 1956. He testified that he was arrested on July 18, 1941 at Riga, Latvia. About ten days later he was sent to the central prison. He remained there for some thirteen months and four days until he was released on August 22, 1942. Approximately eleven months or a year after arriving at the prison, he was interrogated for the first time. The witness recalled that Laipenieks was sitting at a desk. He knew who it was because Laipenieks was a famous athlete. He had seen his pictures in the papers and it was well known that Laipenieks was working in the prison. Laipenieks also had a reputation for beating people. There was also a guard wearing a green uniform in the cell when he was interrogated. Upon a signal from Laipenieks, the guard hit Virsis, broke his nose and while he was laying on the ground, the guard hit him with a blackjack. The witness testified that two or three weeks later he was questioned again by Laipenieks. This time Laipenieks got angry, told him to take off his shoes, made him lay face down on the couch and Laipenieks beat him on the soles of his feet with a blackjack. Virsis had never seen Laipenieks in person before the interrogations and never saw him again before trial.

After being released from prison on August 22, 1942, Virsis ultimately went to Reutligen, Germany. While living there he learned that persons who were mistreated during the German occupation of Latvia were to report to the French authorities. Virsis and an acquaintance, Arnold Berzins, went to a police station. Virsis proceeded to testify about a statement he made to the police on July 8, 1947 which was marked *Exhibit G-19 and Exhibit G-*

19A in evidence. Unlike Berzins who made a statement to the police at the same time, (*Exhibits G-19 and G-19A*) Virsis complained that his statement was incorrect in many respects because of a communication problem. He was not arrested on July 8, 1942 by the Gestapo. Instead, he was arrested on July 18, 1942 by the Latvian Political Police. Laipenieks was not the Deputy Chief of the German Gestapo. Rather, he was an interrogator. Virsis' nose was not broken, it was his tooth. Two of Laipenieks assistants did not come into his cell, make him take off his shoes and hit him with bludgeons on the soles of his feet. Laipenieks himself did this and the guards were not present.

Virsis proceeded to identify photograph number 7 from a photograph display marked *Exhibit G-41* as being the person he recognized as Laipenieks. He described Laipenieks as a person with blonde hair and about two years older than he was. He could not, however, remember the name or the face of the person who beat him so badly at the time of the first interrogation. Virsis maintained that he had never talked about Laipenieks with Arnold Berzins who, like Virsis, had given a statement to the French at Reutligen on July 8, 1947. this contradicts the testimony of Arnold Berzins who recalled that they had discussed Laipenieks.

Ber Maister, also known as Ber Meister, was another witness who testified at trial for the Government (Tr. p. 635-754). Maister said that while he was detained at the central prison during September 1941, a group of six or seven persons, including a person he remembered as Laipenieks, entered a cell in which he and some 60 other persons were detained. Laipenieks and the rest of the group brutally mistreated an elderly Jewish person, Zalman Levitanus, until Levitanus fell to the ground. Maister said that the following day he buried the same Levitanus. He also recalled that at the time of that

incident several other cellmates were beaten by members of the group.

Maister was born in Riga, Latvia on March 15, 1919 and now resides in Israel. The witness testified about the many problems Jewish persons faced in Riga, Latvia after the German forces arrived there on July 1, 1941. There were cases when they were beaten. They were not allowed to stand in line to buy food. They were required to register at their places of employment. They were stopped on their way to and from work and taken to police headquarters. They also suffered countless other indignities.

The witness said that on August 30, 1941 he was arrested in Riga by two persons in Latvian Army uniforms. He was accused of having been in the Komsomol or being a Komsomoletz. He was beaten for about an hour and as a result his face was swollen. The following day he was interrogated and beaten again. A day or so later he was transferred to the central prison where he was again beaten.

Maister described a brutal incident involving an elderly Jewish person that occurred about three or four days after he arrived at the prison. A group of six or seven people entered the cell where Maister and some sixty other persons were being detained. Maister recognized three people in the group, i.e., Laipenieks, Martins Grundmanis, and Petrojskis. Each of them was well-known a sportsman in Latvia. In addition, Maister had seen him in a Latvian army uniform. Members of the group asked the name of every person whom they encountered in the cell. When they came to an elderly gentleman who identified himself as Levitanus, the respondent started screaming at him and said that he was the father of two brothers who had persecuted Latvians in the Russian days and had given trouble to the sportsmen. Maister said that the respondent started

beating Levitanus with a rubber club. The rest of the group also joined in and beat Levitanus with their fists, with their feet and with whatever they had in their hands. The respondent then gave Levitanus, who was a religious man and the president of a synagogue, a Jewish prayer book and told him to sing. The following day the witness and a person by the name of Krieger went on a work detail to dig a grave. Maister said that the person they buried was the same Levitanus who was so badly beaten a day earlier by the respondent and his associates. At trial, the witness also described beatings that were inflicted on other persons in the cell at the time of the Levitanus incident.

The witness testified that after he immigrated to Israel he saw an advertisement in a newspaper asking people who knew about the activities of Edgars Laipenieks to contact the World Jewish Congress. He did so and at trial identified a letter he had written on October 29, 1974 which was marked *Exhibit G-39A* in evidence. Subsequently, he was invited to visit the American Consulate in Tel Aviv. He went there and on December 31, 1974 signed an affidavit regarding the respondent which was marked *Exhibit G-39B* in evidence. At the time he visited the American Consulate he was, however, unable to identify a photograph of the person he remembered as Laipenieks (*Exhibit G-39B*). About one year later he was contacted by Inspector M. Radifker also known as Radiwker, of the Israeli Police. On November 25, 1975 he made a sworn statement at the Tel Aviv Police Headquarters which was marked *Exhibit G-39C* in evidence. Again, he was unable to identify a photograph of the respondent. Subsequently, at the end of 1975 or in early 1976 he was interviewed by a Mr. Orbach and a Mr. Parker from the Office of Special Investigations at Tel Aviv. Maister recalled signing a statement and being shown photographs on this occasion.

Appendix H

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Maister was called upon to explain why he had neglected to mention the respondent and the Levitanus incident at two other interviews, one in 1945 and the other in 1975. He had been questioned by the Russians in the summer of 1945 and questioned again when he met with an Israeli official for several hours at Tel Aviv after he immigrated to Israel in 1975. He was also asked to explain why he said in the statement made before Radiwker on November 25, 1975 that only Levitanus was beaten at the time of the incident in the cell (*Exhibit G-39C*), which sharply conflicts with his letter to the World Jewish Congress on October 29, 1974 (*Exhibit G-39A*) in which he stated, that others were not spared either, and his testimony at trial describing beatings administered to others in the cell. His explanation was that the events occu-red about forty years ago and it was hard for him to remember (Tr. p. 737, 738). Nevertheless, he maintained that the information furnished to Radiwker (*Exhibit G-39C*) was accurate (Tr. p. 737, 738).

THE RESPONDENT'S TESTIMONY

The respondent testified at great length at trial (Tr. p. 40-127, 136-276, 858-965, 984-1051). Laipenieks said that he was born on June 25, 1913 in Latvia and is now a citizen of Chile. His parents were teachers. He had three brothers, Vilnis, Ziedonis, and Miervaldis, and has a sister, Austra (Tr. p. 100-106). Vilnis died in about 1934 or 1935 when he was seven or eight years old. Ziedonis, who was approximately four years younger than the respondent, died in 1977 or 1978. Miervaldis, who was some four or five years younger than the respondent, died in 1980. The respondent testified that Miervaldis and he worked together for the Latvian Auxiliary Police

during 1941 and 1942 (Tr. p. 995-1000).[10] Austra, who is one year younger than the respondent, lives in Australia. The respondent graduated from the Jelgava State Teachers Institute in 1934. He served in the armed forces of Latvia from September 4, 1934 until September 30, 1935. On October 5, 1936 he entered the University of Latvia. While attending the University, he worked in the morning teaching school. In the afternoon he went to classes and engaged in sports, excelling in track, field and skiing. On September 3, 1939 he married Tamara Matisons whose father owned a large bakery in Latvia. About three months later in December 1939, the respondent graduated from the University with a Bachelor's Degree in Economics.

The respondent testified that after graduating from the University in December 1939 he continued teaching school on a regular basis until about May 1941. The Russians occupied Latvia from June 1940 to June 1941. He said that times were very hard during the Russian rule. Several of his friends were arrested and murdered by the Soviet Secret Police. Many of his students disappeared and sometimes were arrested in the classroom. Thousands of Latvians were deported to Siberia, including his wife's parents. A large number of these deportations and atrocities were committed during June 1941. He was concerned that he would be annihilated. Therefore, on June 13, 1941 he took his wife and his son, Juris, and they hid in a forest until the German Army arrived on June 21, 1941. He then returned to Riga and accepted a part-time summer position exhuming bodies and identifying Latvians who had been murdered by the Russians. He said that it was horrible to dig up his

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[10] Striguns (*Exhibit G-49, parts 1 and 2, and Exhibit G-49A*) and Salminsh (*Exhibits G-52 and 52A*) also testified that the Laipenieks brothers, Edgars and Miervaldis, worked together for the Latvian Auxiliary Police.

personal friends and students and he therefore developed hatred and revenge against everything Russian and Communist.

The respondent testified that before the Russian occupation, there existed in Latvia an organization known as the Latvian Political Department (Politska Parvalde) which was responsible for suppressing Communist activities. When the Russians arrived in June 1940, the organization quickly disbanded. Many of the members were captured and killed. When the German Army gained control of Latvia on June 22, 1941, the organization was re-established and was known as the Latvian Auxiliary Police. At the suggestion of Victor Bucenieks, who was a fellow athlete and a famous long distance runner, the respondent in about July 1941 voluntarily joined the Latvian Auxiliary Police. He served as an investigator from July 1941 until August 1943. While working for the police he was assigned to duty at various times at the police headquarters and at the central prison. He interrogated prisoners and arrestees at both locations. In the beginning, his job consisted of investigating and taking statements from persons who were accused of being communists or suspected of being otherwise involved in communist activities during the Russian rule. In the fall of 1942, his duties were changed. Thereafter he was involved mainly in seeking out and combating paratroopers and saboteurs. He continued performing these duties until he left the police in about August of 1943. The respondent said that as an investigator he did not supervise anyone. From the fall of 1941 to the fall of 1942 his working station was at the police headquarters. He did not have a regular office. Instead, there was one big room with tables and chairs. He did most of his work there but occasionally went to the central prison. Persons thought to be communist or involved with the Russians were housed at the prison.

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The respondent maintained that he did not associate with the Germans except once when he worked briefly with a German Colonel in counter intelligence. He did recall Edgars Salminsh who worked with him as an investigator.[11]

Laipenieks admitted that he did occasionally hit prisoners with his hands (Tr. p. 257, 258) (*Exhibit G-55B*). He recalled one incident at headquarters when he struck a Soviet Security Police Detachment leader (Tr. p. 257, 258, 264). He insisted, however, that he never shot anyone, that he was never present at any shooting, that he was never present at beatings, and that he never examined prisoners in a cell by himself. He characterized Maister's testimony[12] as absolutely not true (Tr. p. 1014). Except for Salminsh, he did not recall any of the persons who testified against him (Tr. p. 1019-1025, 1034, 1935, 1938). He said that he never wore boots, that he never offered a pill to anyone, that he never tortured prisoners, that he never used a rubber truncheon, and that he never beat anyone on the soles of the feet. The respondent testified that he left the police in about August 1943, and assisted in operating and managing his in-law's bakery until the Russians arrived in Latvia during July or August of 1944.

The respondent further testified that after fleeing with his family from Lavtia in advance of the invading Russians during July or August 1944, he first went to East Prussia and later to Austria. He said that he resided at various locations and had several different jobs from 1944 until he immigrated to Chile in 1947.

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[11] Salminsh testified by video taped deposition in Riga, Latvia (*Exhibits G-52 and G-52A*).

[12] Maister testified at trial that he was an eyewitness to a beating of an elderly Jewish person by the respondent.

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After leaving Latvia he lived in East Prussia for a few months. He worked there in a tank parts manufacturing factory. From about December 1944 to March 1945 he lived in Innsing, Austria, near Innsbruck and worked in a soap and margarine factory. From about March 1945 to May 1945 he was employed in a hospital in Shruns. During a portion of 1945 and continuing until the fall of 1946 he worked as a physical education instructor at the University of Innsbruck. During 1946 and 1947 he worked for the French Army. From 1944 until 1947 he and/or his family lived at various times in or near East Prussia, Schruns, Innsing, Innsbruck, Schwartzach, Blundenz, St. Christoph (Sankt Christoph), and Nofels.

The respondent denied that he was arrested, or detained in France by agents of the French Government in connection with his occupation and activities as an employee of the Latvian Auxiliary Police from 1941 to 1943. He said that in 1947 while in Paris, France he appeared before a French-Russian Military Commission to get travel papers to immigrate to Chile. He was questioned about how long he had been in Austria, what he had been doing there, and why he left Latvia. He said that he was not asked about his wartime activities under the Germans in Latvia.

After obtaining the travel documents he and his family boarded a train at Paris en route to Le Havre where they were to board a ship to South America. When the train arrived in Le Havre, he was met at the depot by French Secret Service agents who accompanied him to an office where he was questioned for about one hour.[13] Later, they went with him to the ship where his wife and

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[13] The questioning apparently was triggered by accusations made against the respondent by Arnold Berzins and Edward Virsis (See *Exhibits G-19 and G-19A*).

the children were so that they could examine a travel document and some papers dealing with his employment as a coach for the French Army. After the questioning was completed, the respondent went to dinner with the agents and then boarded the ship enroute to South America. The respondent insisted that he had not been arrested by the French agents but was simply questioned.

The respondent readily admitted that he was convicted on August 24, 1945 in the Summary Court of the Military Government of Feldkirch for theft of a bicycle (*Exhibits G-1P, G-20, and G-20A*) and on April 9, 1946 in the Interim Court of Innsbruck for possession of weapons and complicity in the possession of weapons (*Exhibits G-21 and G-21A*).

The respondent testified in detail about the events leading up to the issuance to him of an immigrant visa by Walter E. Kneeland, Consul of the United States[11] at Santiago, Chile on March 1, 1960 (*Exhibit G-1A*).

Laipenieks maintained that on his application for a visa he did not conceal information concerning his occupation and activities from 1941 to 1943, that he did not withhold information concerning his encounter with the French Secret Service in 1947, and that he did not suppress facts about his arrest and conviction in 1946 at Innsbruck, Austria on the charges of possession of arms and complicity in the possession of arms.

The respondent explained that when he made his application for an immigrant visa in Chile during 1959 and 1960, he was not able to read, write, or speak English. He recalled being interviewed by a secretary at

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[11] The affidavit of the deceased Walter E. Kneeland is marked *Exhibit G-42* in evidence. William Lawrence Krieg also testified for the Government about the visa issuing process (Tr. p. 364-398).

the American Embassy on two occasions. She spoke to him in Spanish, which he understood, but completed the visa application in English which he did not understand. He did not recall filling out a preliminary application in the Spanish language. He said that he was only asked general questions about his occupation and residences. He maintained that he truthfully answered every question that he was asked. He noted, however, that there was some incorrect information in the visa application. Since he was born in 1913, the information in item 25 of *Exhibit G-1* to the effect that he had been a student and a physical education instructor beginning in 1914, when he was only one year old, was not entirely correct (Tr. p. 120). He also said that when he visited the American Embassy, he did not reveal either the 1945 bicycle conviction (*Exhibits G-20 and G-20A*) or the 1946 arms conviction (*Exhibits G-21 and G-21A*) because he understood that the French Amnesty (*Exhibit 1A, p. 17-19*) eliminated the need to mention the convictions.

Laipenieks explained that a few weeks after the first interview he was called back and confronted with information the Embassy had obtained relating to the 1945 bicycle conviction. When he told them why he neglected to provide information about the conviction, he was asked to furnish a copy of the Amnesty and he did so. The record shows that the Consul concluded that the bicycle theft conviction was a misdemeanor classifiable as a petty offense under Section 212(a)(9) of the Act, 8 U.S.C. 1182(a)(9) and therefore was not a valid basis for denying the visa. The record also shows that the Consul concluded that the respondent had not willfully misrepresented material facts relating to the conviction which would bring into play section 212(a)(19)

of the Act, 8 U.S.C. 1182(a)(19) (*Exhibit G-1A*).[15] Accordingly, on March 1, 1960 the respondent was issued an immigrant visa and on March 9, 1960 he entered the United States as a permanent resident (*Exhibit G-1A*).

During the past twenty-two years the respondent has been a law abiding and productive member of the community. His principal work has been in the physical education field. He has been married and divorced twice. Both of his former wives and the four children of his first marriage reside in the United States.

THE RESPONDENT'S WITNESSES

Five witnesses, Edward J. McCrink (Tr. p. 1059-1063), Janis Olgerts Stendzenieks (Tr. p. 1063-1088), Nicholas Stuls (Tr. p. 1089-1100), Alfons J. Mednis (Tr. p. 1100-1107), and Louis J. Bitterlin (Tr. p. 1109-1114) testified for the respondent at trial.

McCrink, Mednis and Bitterlin testified that respondent's reputation for truth and veracity was very good. Stenzenieks and Stuls, who had known the respondent in Latvia, testified in essence that in their opinion the respondent is not shown in the photograph of a hanging which had been marked *Exhibit G46A6* in evidence.

THE ISSUE OF FRAUD AND WILLFUL MISREPRESENTATION OF MATERIAL FACTS

One of the Government's two chief charges is that the respondent obtained his immigrant visa by fraud and by willfully misrepresenting or suppressing material

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[15] On November 4, 1959 the American Consul at Santiago, Chile requested an advisory opinion from the Department of State in Washington, D.C. concerning the respondent's eligibility for an immigrant visa (*Exhibit G-55B*). The reply of the Department is not part of the record.

facts because on his visa application (*Exhibit G-1A*) he failed to reveal, (1) that he had been an investigator for the Latvian Auxiliary Police from July 1941 to August 1943, (2) that he had been sought and detained between 1946 and 1947 by agents of the French Government in connection with his occupation and activities from July 1941 to August 1943, and (3) that he had been arrested and convicted in 1946 at or near Innsbruck, Austria by an Intermediate Tribunal of the French Military Government of Austria on the charges of possession of arms and complicity in the possession of arms (*Exhibit G-A and G-B*). We do not agree that the record as a whole adequately supports a finding that the missing information relating to respondent's employment with the Latvian Auxiliary Police and questioning by agents of the French Government was willfully concealed or that it related to a material fact. Moreover, although we do find that the omission concerning the 1946 arms conviction was willful, in the sense that it was a voluntary and deliberate nondisclosure with knowledge that it should be listed, we nevertheless conclude that it did not relate to a material fact.

Section 212(a)(19) of the Act, 8 U.S.C. 1182(a)(19), bars from entry into the United States "Any alien who seeks to procure, or has sought to procure, or has procured a visa or other documentation . . . by fraud, or by willfully misrepresenting a material fact." An indispensable ingredient of subsection (19) is that the act be done willfully. Even though the exact meaning of "willful" may vary, as used in the statute presently under consideration, it means a voluntary and deliberate misstatement. *Espinoza-Espinoza v. INS*, 554 F.2d 921, 925 (9th Cir., 1977); *Matter of Kai Hing Hui*, 15 I&N Dec. 288 (BIA 1975); *Matter of S- and B-C*, 9 I&N Dec. 436 (BIA 1960; AG 1961).

Appendix H

Matter of Laipenieks, Decision of the Immigration Judge, Dated June 9, 1982

The application for an immigrant visa executed by the respondent on March 1, 1960 was printed in the English language, a language the respondent could not read, write, nor speak. One of the key questions, i.e., item 25, relating to residences and occupations, asked only for information concerning "principal" occupations after the sixteenth birthday.[16] The question on its face is not sufficiently clear to warrant the firm conclusion that it mandated disclosure of each and every job. In addition, the record is ambiguous as to the extent an applicant for a visa was personally questioned about the entries on the form.[17] We are therefore unable to tell with any degree of certainty whether respondent was specifically quizzed as to each item on the application, or whether he was only questioned in broad terms with his principal replies recorded, as respondent maintained at trial. We must also reject the claim that the respondent was required to show that he had been questioned by French agents while he was in Le Havre during 1947. There is no entry on the application that calls for such information. We further note that in 1962, two years after he immigrated to the United States, the respondent readily made known to the Central Intelligence Agency that he had worked as an investigator for the Latvian Auxiliary

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[16] Compare the English version of the application [Form FS-265a (Revised 12-1-56)] completed by the respondent on March 1, 1960 (*Exhibit G-1A*), with the more precise Spanish language edition [Form FS-510 (Spanish) (8-17-59)] completed by Alfreds Sterns on July 7, 1962 (*Exhibit G-24A*). Item 25 of the Spanish version calls for disclosure of residences and occupations for six months or more rather than principal residences and principal occupations required by the English edition completed by the respondent. In addition, item 34(1), parts (a) through (d) of the Spanish issue relating to arrests and convictions, etc., is much clearer than the earlier English form.

[17] William Lawrence Krieg, a retired Foreign Service Officer, testified concerning the procedures followed in issuing immigrant visas (Tr. p. 364-398).

Police and that he had been questioned in 1947 by French agents (*Exhibits G-55A1, G-55A2, and G-55A7*). This 1962 acknowledgement is not consistent with the theory advanced by the Government that the respondent willfully concealed this very same information from the American Consul only two years earlier. We therefore find that the missing information relating to respondent's employment with the Latvian Auxiliary Police and his questioning by French agents was not willfully omitted. With respect to the respondent's failure to reveal the 1946 arms conviction, we reach a different conclusion. The record shows that the respondent failed to provide information about either the 1945 bicycle conviction or the 1946 arms conviction at the time he initially applied for his visa. When the Consul obtained independent notice about the 1945 conviction, the respondent readily admitted the conviction and it was then placed on the visa application (*Exhibit G-1A, item 29*). We are satisfied therefore that because respondent's attention had been specifically called to the question of convictions, he then well knew that despite the 1953 French Amnesty (*Exhibit G-1A, p. 17-19*) he was required to show all convictions. The respondent's testimony to the contrary is not persuasive. Accordingly, we find that the respondent voluntarily and deliberately withheld information from the visa application relating to the 1946 arms conviction.

As to the question of whether the omissions were, in any event, related to material facts, we apply the tests for materiality set out in *Matter of S- and B-C-*, supra, and find that the misrepresentations were not material. The Attorney General held in *Matter of S- and B-C-*, that a misrepresentation made in connection with an application for a visa is material if either (1) the alien is excludable on the true facts, or (2) the misrepresentation tends to shut off a line of inquiry which is relevant to the alien's eligibility and which might well have resulted in a proper determination that he be excludable. The

application of the test turns on the answers to three questions. First, does the record establish that the alien is excludable on the true facts? If it does, then the misrepresentation was material. Second, if the alien is not excludable on the true facts, does the misrepresentation tend to shut off a line of inquiry which is relevant to the alien's eligibility? Third, if a relevant line of inquiry has been cut off, might that inquiry have resulted in a proper determination that the alien is excluded.[18]

Had the respondent in the instant case been more precise when he applied for an immigrant visa in Chile during 1960, the consul would have known that he had been employed by the Latvian Auxiliary Police, that he had been questioned by French agents, and that he had been convicted on arms charges. However, he was not excludable under any provision of the Act because of his employment or because he was questioned. Moreover, even had that information been noted on the visa application, we find, applying step two, that it did not tend to shut off a line of inquiry which was relevant to the respondent's eligibility for an immigrant visa and which might well have resulted in a proper determination that he be excluded. We specifically find that it would be impermissibly speculative and highly unlikely that these disclosures would have resulted in an admission on the part of the respondent in Chile, that some eighteen or

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[18] We are aware that the United States Court of Appeals for the Ninth Circuit in *United States v. Rossi*, 299 F.2d 650 (9th Cir. 1962) seems to have taken a more restrictive approach, holding that a finding of "materiality" is warranted only if the truth would have resulted in a determination of eligibility. This view that false statements are material only if on the true facts the alien was excludable denies subsection (19) of any real meaning as an independent ground of exclusion since under this reading an alien would in every case be excludable under another part of 212(a), 1182(a), before subsection (19) would be activated.

nineteen years earlier in Latvia, he had committed a crime involving moral turpitude, or that he had committed acts which constitute the essential elements of such a crime which would have led to a proper determination by the consul that respondent was ineligible for a visa under Section 212(a)(9) of the Act, 8 U.S.C. 1182(a)(9). Even today the respondent maintains that he committed no such crime and no such acts (Tr. p. 145-148).[19] Moreover, neither the testimony of Krieg (Tr. p. 364-398) nor the affidavit of Kneeland (*Exhibit G-42*) convince us that a visa could correctly have been refused under the law based on this unlisted information.

Finally, the respondent was not excludable on the true facts under Section 212(a)(9) of the Act, 8 U.S.C. 1182(a)(9) as a result of the 1946 convictions (*Exhibits G-21 and G-21A*), because possession of arms under the conditions set forth in the record was not a crime involving moral turpitude. See *Andreacchi v. Curran*, 38 F.2d 498 (S.D., N.Y., 1926); *Ex Parte Saraceno*, 182 F. 955 (S.D., N.Y., 1910); *Matter of Granados*, 16 I&N Dec. 726 (BIA 1979). Using the second step of the test, the misrepresentation concerning the conviction did, in fact, tend to shut off a line of inquiry relevant to his eligibility — the question of whether the arms conviction involved a crime of moral turpitude. However, applying the third

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[19]In order to determine if an alien has adequately admitted the commission of a crime involving moral turpitude, it must first be established that the acts alleged to have occurred constitute a crime in the pertinent jurisdiction. The alien must be given a definition of the crime and it must be explained to him in understandable terms. The alien must then admit all the factual elements which constitute the crime. The admissions must be clear and unequivocal and it must appear that the crime is one which involves moral turpitude. *Matter of J-*, 2 I&N Dec. 285 (BIA 1945). See *Matter of E-V-*, 5 I&N Dec. 194 (BIA 1953). Cf. *Matter of P-*, 6 I&N Dec. 193, 194, n. 1 (BIA 1954).

part of the test, the respondent would have been able to show that he was not convicted of a crime involving moral turpitude. Thus, although the misrepresentation was not material and therefore the respondent was not excludable under Section 212(a)(19) of the Act, 8 U.S.C. 1182(a)(19) as an alien who had willfully misrepresented material facts.

THE ISSUE OF PERSECUTION BECAUSE OF RACE, RELIGION, NATIONAL ORIGIN OR POLITICAL OPINION

The second amd more serious charge relates to the assertion that the respondent was a voluntary member of the Nazi directed or associated Latvian Auxiliary Police from July 1941 until August 1943 and, in that capacity, allegedly participated in the persecution of persons on account of race, religion, national origin or political opinion.

Section 241(a)(19) of the Act, 8 U.S.C. 1251(a)(19), provides as follows:

> (a) Any alien in the United States . . . shall, upon the order of the Attorney General, be deported who--
>
> (19) during the period beginning on March 28, 1933, and ending on May 8, 1945, under the direction of, or in association with--
>
> (A) the Nazi government of Germany,
>
> (B) any government in any area occupied by the military forces of the Nazi government of Germany,
>
> (C) any government established with the assistance or cooperation of the Nazi government of Germany or

> (D) any government which was an ally of the Nazi government of Germany,
>
> ordered, incited, assisted, or otherwise participated in the persecution of any person because of race, religion, national origin or political opinion.

Subsection (19) involves two significant segments. First, the persecution must be during the specified time period under the direction or in association with the Nazi or related governments. Second, and of critical importance in the present proceedings, the Government must establish by clear, unequivocal and convincing evidence that the persecution was because of one of the four reasons in the subsection, i.e., race, religion, national origin or political opinion.

Laipenieks' current difficulties commenced on March 21, 1972 when he submitted an application to file a petition for naturalization to the Immigration and Naturalization Service in San Diego (*Exhibit G-1D*).[20] In due course, two sworn statements were taken from the respondent (*Exhibit G-1G and G-1H*). The first focused on his activities in Riga, Latvia during World War II. The second dealt mainly with whether he had abandoned his residence in the United States by protracted stays in Mexico while he was there training olympian class athletics. At trial, the video taped oral deposition testimony of nine Government witnesses taken in the Soviet Union were accepted into evidence. Six witnesses personally testified before the court for the Government and

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[20] The respondent subsequently filed a petition for naturalization in the United States District Court at San Diego on March 26, 1973 (*Exhibit G-1F*). The petition is apparently still pending.

five witnesses testified for the respondent. The respondent also testified at great length. In addition, some one hundred and fifty-nine exhibits were made part of the record.

With respect to the admissibilitty of the deposition testimony taken in the Soviet Union and the admissibility of the documentary evidence, including the foreign documents offered by the Government, the threshold question is "fundamental fairness" and probativeness. *Martin-Mendoza v. INS*, 499 F.2d 918, 921 (9th Cir., 1974). See also 8 C.F.R. 242.14(c). This evidence is not so infirm as to clear this modest barrier. However, whether the video taped oral deposition testimony, the trial testimony and the documentary evidence is sufficiently robust to meet the more demanding "clear, unequivocal and convincing" standard of proof as to events that allegedly occurred forty years ago is a different matter. We think this accomplishment is beyond them.

Turning first to the video taped oral depositions, we express our concern with the unfortunate prejudicial and highly suggestive language used by the Soviet officials when the witnesses were questioned before the depositions were taken (*Exhibit R-1 through Exhibit R-5*) and when the deposed witnesses testified in the Soviet Union (*Exhibit G-44A through Exhibit G-52A*). In the prehearing statements of three witnesses, which are part of the record, the presiding Soviet official referred to this matter as the case of the Nazi war criminal Laipenieks and used otherwise improper language. Even though the statements of the other six deposed witnesses are not before us, we believe that it is reasonable to assume that in each case they were interviewed in advance and that similar corrosive language was used. The same serious error was committed by Soviet officials when the depositions were taken. Many times the presiding Soviet officer, in the presence of the witness, referred to the

instant matter of the war criminal case or the Nazi criminal Laipenieks case and frequently sharply curtailed the right of respondent's counsel to cross examine, which was required for a full and true disclosure of the facts.

In evaluating the weight to be given to the deposition testimony, we have been mindful of the prejudicial language used by the Soviet officials, the restricted right of cross examination which limited the opportunity to expose faults in the perception and memory of the witnesses and the intimidating atmosphere. Accordingly, we have, to a large extent, discounted this testimony. Considering the totality of surrounding circumstances, we find that the depositions do not meet the fundamental fairness test of *Martin-Mendoza.*

The deposition testimony does not, in any event, by itself, or when coupled with the other evidence, tip the scale in favor of the Government. Only Engelis and Zvirgzds of the deponents claimed that the respondent had physically assaulted them. Engelis was seventy-seven years old at the time of the deposition. He was unable to recognize the respondent as the person who had beaten him in 1941 from a photographic display marked *Exhibit G-45A1* in evidence (*Exhibit G-45A, p. 30, 31*). In addition, although the witness recalled the person he remembered as Laipenieks going into a room to have a smoke (*Exhibit G-45A, p. 11*), the record reflects that the respondent was an olympic class athlete and did not smoke until after he immigrated to the United States in 1960 (Tr. p. 1018).

Zvirgzds was the other deponent who maintained that Laipenieks had beaten him. He was sixty-six years old when the deposition was taken. Initially, he identified photographs 1, 2, and 5 from a group of eight photographs which were marked *Exhibit G-48A1* in evidence as those who reminded him of the person he knew as Laipenieks

(*Exhibit G-48A, p. 29*). Later, he said that photograph number 1 and perhaps number 5 represented a likeness of Laipenieks (*Exhibit G-48A, p. 30*) but conceded that he could not say for sure (*Exhibit G-48A, p. 30*). The witness's testimony was also somewhat impeached by an August 17, 1976 statement apparently made to a Soviet official in which he asserted that a person by the name of Garbrans had been beaten by a Latvian whose name Zvirgzds did not then recall. At the deposition Zvirgzds remembered that Garbrans had told him some forty years earlier that he thought that Laipenieks had beaten him (*Exhibit G-48A, p. 30, 40*). Nor does the testimony of the other seven deponents, i.e., Rode, Smekerstans, Endelis, Striguns, Ignats, Beikmanis and Salminsh, significantly strengthen the Government's case.

The seventy-three year old Rode's memory was faulty. He was shown the ghastly hanging scene (*Exhibit G-46A6*) at the procurator's office in 1979 (*Exhibit R-2*) but did not recall seeing the photograph prior to the time of his deposition in 1981 (*Exhibit G-44A, p. 50*). The seventy year old Smekerstans had much the same problem. His memory was not good. Occasionally, he was unresponsive. He had difficulty hearing, his eyesight was gone and his nerves have been damaged. Endelis was another deponent. He was not asked to identify the person he remembered as Laipenieks from a group of eight photographs as many of the other witnesses were. He did, however, place Laipenieks at the central prison in 1941. Striguns and Salminsh were two other deposition witnesses. They testified that they were familiar with Edgars and Miervaldis Laipenieks when the brothers worked for the Latvian Auxiliary Police. They were not beaten nor did they claim to be eyewitnesses to a beating. Ignats was one of the other deposed witnesses. He recalled that a person by the name of Laipenieks came into a cell at the prison and explained the screening

process to the inmates. He saw Laipenieks only that one time. Like Endelis, he was not asked to identify the respondent from an photospread. Finally, the testimony of Beikmanis, who was eighty years old, was scattered, imprecise and discredited.

We are therefore mindful of the fact that only two of the nine deponents, Rode and Smekerstans, whose memories were noticeably faulty, were able to positively identify the respondent as the person they knew as Laipenieks from a group of eight photographs. Engelis was unable to identify the respondent. Endelis, Ignats and Beikmanis were not asked to pick out the respondent from a photospread. And, Zvirgzds, Striguns and Salminsh each initially stated that more than one photograph of the eight they were shown reminded them of the person they remembered as Laipenieks.

We are also aware of the fact that several of the deponents maintained that they recalled cellmates telling them that Laipenieks had beaten them; however, given the time span of some forty years after the conversations took place and the fact that the victims of the alleged mistreatment did not appear in court and publicly testify, we must view these hearsay statements with the utmost caution.

Next, we examine and evaluate the trial testimony of five of the six Government witnesses i.e., Dr. Raul Hilberg, Gideon Epstein, Arnold Berzins, Edward Virsis and Ber Maister whose testimony related to the persecution issue. The testimony of the sixth trial witness, William Lawrence Krieg concerned the question of fraud and willfully concealing material facts.

Dr. Hilberg testified to support the Government's fundamental claim that the Latvian Auxiliary Police, for whom the respondent admittedly worked from 1941 to 1943, carried out the policy of persecution against Jewish persons and political groups which had been set

and were overseen by the Nazi government and in particular by Einsatzkommando 2 (EK 2). To support this thesis, the Government relied primarily on the testimony of Dr. Hilberg (Tr. p. 177-307, 313-363, 480-547), the video taped depositions of Striguns (*Exhibit G-49A*) and Salminsh (*Exhibit G-52A*), the Stahlecker report (*Exhibit G-9, G-9A, G-10 and G-10A*) and memoranda from various German officials. Although Dr. Hilberg was eminently qualified to testify on the holocaust and related events, it is not at all clear that Dr. Hilberg's testimony and the other matters of record establish that there was an institutional connection and identity of mission between the infamous German EK2 and the indigenous Latvian Auxiliary Police. EK2 was a despicable killing unit made up exclusively of Germans. The Latvian Auxiliary Police was limited to Latvians whose duties included the investigation, arrest, interrogation and the procurement of evidence relating to Latvians accused of having connections or sympathies with the Soviet government. We are unable to find therefore by clear, unequivocal and convincing evidence which does not leave the issue in doubt that the Latvian Auxiliary Police and the Nazi government of Germany were interwoven in purpose, ideology and action.

Gideon Epstein was another witness wno testified for the Government at trial. By his testimony, it was established beyond a well-founded doubt that the two 1942 signatures of Alfreds Sterns in *Exhibit G-9* were authentic and that the signature of "E. Laipenieks" in a 1938 passport (*Exhibit G-8*) was made by the respondent.

Arnold Berzins and Edward Virsis also testified for the Government at trial. They asserted that a person by the name of Laipenieks had beaten them. Berzins recalled that the person he knew as Laipenieks was dressed in a jacket with black boots, knee length boots and knee length pants like horse riding pants. Not one of the other

eleven Government witnesses who asserted that they saw Laipenieks at the police headquarters or at the central prison described Laipenieks this way. In addition, Berzins was unable to identify the respondent at trial as the person he remembered as Edgars Laipenieks (Tr. p. 446). Virsis' testimony was of less value. His account at trial of a beating he received from Laipenieks in 1942 is at sharp odds with a 1947 statement he made to the French police (*Exhibits G-19 and G-19A*). In his 1947 statement, made only five years after the alleged incident, Virsis asserted that he was arrested on July 8, 1942 by the Gestapo, that Laipenieks was the Deputy Chief of the German Gestapo, that his (Virsis) nose was broken and that two of Laipenieks assistants made him take off his shoes and hit him with bludgeons on the soles of his feet in the presence of Laipenieks. At trial, Virsis recalled the event somewhat differently. He said he was arrested on July 18, 1942 by the Latvian Political Police, that Laipenieks was an interrogator, that his tooth was broken, and that Laipenieks personally beat him. We note, too, that although Virsis traced these significant contradictions to his inability to communicate with the French Police, Berzins, who made a sworn statement to the French Police at the same time, had no such complaint.

Another witness who testified for the Government at trial was Ber Maister who vividly described a brutal incident involving an elderly Jewish gentleman, Zalman Levitanus, which occurred during early September 1941 at the central prison. This is the only occurrence in the record where a person identified as Jewish was allegedly beaten by the respondent. There are two disturbing aspects of his testimony. First at trial, the witness testified that at the time of the Levitanus beating that other inmates of the cell were beaten too (Tr. p. 734-737). This assertion contradicts a November 25, 1975 declara-

tion made to Inspector Radiwker (*Exhibit G-39C*) in which he said that except for Levitanus, there was no beating. This was compounded at trial by the witness's insistence that the declaration made to Inspector Radiwker was correct (Tr. p. 737). Second, the witnesses identification of the respondent as the Edgars Laipenieks he knew who brutalized Levitanus is puzzling because on earlier occasions in 1974 and 1975 he was unable to identify a photograph of the respondent as the Laipenieks involved in the Levitanus incident.

The record shows that the witness made at least three and probably four statements concerning the Levitanus occurrence during 1974, 1975 and 1976. In a letter dated October 19, 1974 to the World Jewish Congress, Maister said, in part, that--

> In our cell which then held about 60 men prisoners there was also one named Zalman Levitonis whose two sons, Maks and Kalman Levitonis, were well known as soccer players of the Riga "Hacoah." As soon as the "nice kids" found out that he was the father of the two sportsmen, they selected him. First of all, they pummelled him for a long time. *Others were not spared either.* Then they gave him a Hebrew prayer book and ordered him to sing. I can see him to this day: An old man, black and blue from the cruel beating, Zalman Levitonis. I can still hear him scream with pain: "Hear, o Israel" and his cry still rings in my ears (*Exhibit G-39A*) (underlining added).

In an affidavit dated December 31, 1974 before the American Consul, Maister stated, in part, that. . .

> I have examined the attached photograph and I am unable to state that the individual is Edgar Laipenieks as it has been 33 years since I last saw him.

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> Although I never personally suffered at the hands of Laipenieks, I personally witnessed a brutal beating that he administered to a Latvian Jew by the name of Levitanos who shared the same cell with me. Levitanos was beaten with a rubber club and was then taken away and was shot. I do not know if Laipenieks personally carried out the execution. The following day I had to help dig a grave in a cemetery near the prison and I helped to bury Levitanos. I do not know the present whereabouts of any other witnesses to this or any other atrocity committed by Laipenieks (*Exhibit G-39B*).

In a more detailed declaration dated November 24, 1975 before police Inspector M. Radiwker, Maister stated, in p rt, that--

> One day during my arrest a group of Latvians came to my cell in the prison. They wore civilian clothes without PERKONKRUST insignia, without any insignia. I recognized in the group the sportsmen EDGARS LAIPENIEKS, MARTINSCH GRUNDMANIS and another named PETROWSKI. The three were known sportsmen. But I must note here that EDGARS LAIPENIEKS was the most active among them and that he was the leader of the group, the officer. LEIPNIEKS asked every one of us for our family names. *There was no beating.* Only when it came to the old man Zalman Lewitanus and when LAIPENIEKS heard his name, he and the other Latvians became terribly angry and screamed: "So you are the father of the Lewitanus brothers who persecuted us in the Russian days."

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> After that I never saw LAIPNIEKS, but I read in the German-Latvian newspaper that he was active in sports. Two years ago I testified about EDGARS LAIPNIEKS before the US Embassy in Tel Aviv. I have then been asked if I recall that EDGARS LAIPNIEKS had a brother. But I did not know. In the Embassy I saw a picture on which I could not recognize EDGARS LAIPNIEKS because apparently it must have been a picture taken many years later. Also now I have been shown many pictures. Once again I come across the same picture which was shown to me in the Embassy. But I cannot recognize LAIPNIEKS on it, the LAIPNIEKS I knew before. In those days he was a young man, about 27 years old, tall, handsome, a real picture of a sportsman (*Exhibit G-39C*) (underlining added).

Ber Maister's fourth statement was made at the end of 1975 or early 1976 when he was interviewed by a Mr. Orbach and a Mr. Parker from the Office of Special Investigations at Tel Aviv (Tr. p. 704-709, 716). He recalled signing a statement and being shown photographs. Neither that statement nor those photographs were made part of the record.

Although the contradictions in the witnesses testimony concerning the number of persons beaten at the time of the Levitanus incident and his inability at the 1974 and 1975 interviews to identify a photograph of the respondent as the Laipenieks he remembered at the prison, do not destroy his testimony, they do raise doubts about Maister's perception and memory and diminishes the value of his testimony.

We, of course, understand the inherent difficulty of identifying the respondent as the Laipenieks who, some forty years ago, allegedly mistreated inmates of the Riga police headquarters and the Riga central prison. The

lapse of many years between the events and trial does not in itself establish that the identifications were unreliable; however, it is an important negative factor in evaluating and weighing the totality of circumstances surrounding the identifications. *Neil v. Biggers,* 409 U.S. 188, 199-201 (1972) (lapse of seven months between incident and confrontation would be a "seriously negative factor in most cases"); *United States v. Walus,* 616 F.2d 283, 293 (7th Cir., 1980). In addition to the lengthy time between the events and the identifying process, the Government's case suffers from other infirmities.

The respondent testified that he and his brother, Miervaldis Laipenieks, were employed together in Riga for the Latvian Auxiliary Police during the 1941 to 1943 period (Tr. p. 995-1000).[21] They did the same general type of work and were about the same age (Miervaldis was only four or five years younger than respondent). In view of these similarities, there is an underlying uncertainty as to whether the beatings attributed to the respondent may have been inflicted upon the inmates by Miervaldis Laipenieks rather than by the respondent.

The record further shows that for the most part, the witnesses were elderly gentlemen whose memories were frayed, fragile and in a few cases, selective. Two of the principal video taped deposition witnesses, seventy-seven year old Engelis and sixty-six year old Zvirgzds, claimed that the respondent had beaten them; however, they were unable to identify a photograph of the respondent as the person they knew as Laipenieks. The testimony of the two chief trial witnesses, Berzins and Virsis, who

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[21] Striguns (*Exhibit G-49A*) and Salminsh (*Exhibit G-52A*) also testified that the Laipenieks brothers, Edgars and Miervaldis, worked together for the Latvian Auxiliary Police. Striguns remembered that Miervaldis had a gold tooth in the front of his mouth (*Exhibit G-49A, p. 21, 22*). Salminsh, however, did not recall that Miervaldis had any distinctive features that would single him out among the others (*Exhibit G-52A, p. 29, 30*).

asserted that the respondent had also beaten them, was somewhat discredited. With respect to Berzins, there is doubt as to which of the Laipenieks brothers mistreated him. As to Virsis, his testimony was seriously undercut by a 1947 inconsistent statement about Laipenieks.

There is no question as to whether the respondent did occasionally hit inmates at the police headquarters or at the central prison. The record clearly reflects that he has done so (See e.g., Tr. p. 257, 258, 264; *Exhibit G-55B*). Be that as it may, proof that the respondent mistreated prisoners is not by itself enough to sustain the deportation charge under Section 241(a)(19), 8 U.S.C. 1251(a)(19). There must be clear, unequivocal and convincing evidence connecting these acts to the person's race, religion, national origin, or political opinion.[22] Four witnesses, i.e., Engelis (*Exhibit G-45A*), Zvirgzds (*Exhibit G-48A*), Berzins (Tr. p. 400-467), and Virsis (Tr. p. 563-710) testified that the respondent had beaten them. Each was born in Latvia and was therefore identifiable by national origin. There is, however, no other reliable means of distinguishing the four witnesses on the basis of race, religion, national origin, or political opinion.

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[22] The Order to Show Cause (*Exhibit G-A and G-B*) asserts in generalized terms that the persecution was imposed because of race, religion, national origin or political opinion, but does not point to which of the four parts is relied upon. Whether this lack of specificity meets the requirement of Section 242(b) of the Act, 8 U.S.C. 1252(b), that "the alien shall be given notice, reasonable under all the circumstances, of the nature of the charges against him. . ." and the regulations in 8 C.F.R. 242.1(b) which provides that "the Order to Show Cause will contain . . a concise statement of factual allegations informing the respondent of the act or conduct alleged to be in violation of the law . . ." need not be addressed because we rule against the Government on other grounds. We doubt, however, that these inexact allegations are sufficiently explicit to enable the respondent to mount an effective defense. See *Matter of Chery and Hasan*, 15 I&N Dec. 380 (BIA 1975).

Furthermore, the mistreatment that these four witnesses and the other witnesses described could arguably be traced to the claim that they had betrayed Latvia during the repressive Soviet occupation between 1940 and 1941, rather than it being connected to their race, religion, national origin, or political opinion.

For example, Engelis was a Deputy Chief of an Executive Committee for the village of Vidrize under the Russians and was suspected of preparing a list of Latvians who were to be deported to Siberia. He was also accused of being too harsh with the Latvians in looking for weapons, apparently during the Russian rule. Zvirgzds was thought to be a Communist party member and sympathetic to the Russians. Berzins was accused of preparing a list of Latvians who were to be sent to Siberia. Virsis was apparently charged with having been a pro-Soviet who fled with the Russians when the German troops arrived in Latvia during 1941. Moreover, six of the other seven deponents who were imprisoned had similar Soviet ties and were perceived as not having acted in the best interests of Latvia. Rode was an inspector on a Soviet committee. Smekerstans was accused of liquidating private property. Endelis was described as an activist. Striguns was in the Russian army. Ignats worked along side the Soviets attempting to repel the oncoming German troops. Beikmanis was a Soviet activist and a supplemental militia man, and Levitanus, described by trial witness Maister as Jewish, was apparently physically assaulted because he was the father of two sportsmen, Max and Kalman Levitanus, who allegedly persecuted and otherwise gave trouble to the Latvians during the Russian rule between 1940 and 1941 (Tr. p. 654, 656, 729, 737; *Exhibit G-39C*). There was no suggestion that the elder Levitanus was beaten because he was Jewish.

Appendix H

Matter of Laipenieks,
Decision of the Immigration Judge, Dated June 9, 1982

Finally, we consider the respondent's arguments concerning the admissibility of the official foreign documents. The most important claim is that the documents have not been properly certified by an officer in the foreign service of the United States assigned abroad. 8 C.F.R. 287.6 governs the admissibility of official records. An official foreign record must be proved by a copy attested to by the official having legal custody of the record or his deputy, accompanied by a certificate of a Foreign Service Officer of the United States stationed in the foreign country where the record is kept as to the genuineness of the signature and official position of the attesting officer. *Matter of Magana*, Int. Dec. 2729 (BIA 1979). In the present case, the genuineness of the copies were attested to by the custodians in the foreign country but the certifications were made by another official of the same country. In addition, there were certifications by an Officer of the Department of State, Washington, D.C. that the certifying foreign government official was duly recognized by the government of the United States. Although we agree that the certifications should have been made by a Foreign Service officer of the United States stationed in the foreign country, we do not believe that this deviation from the exact procedures set forth in the regulations is so substantial that it requires a finding in an administrative hearing that the documents lack probative value, especially since there was no counter evidence produced by the respondent which challenged their authenticity and accuracy.

One last matter deserves comment. During the lengthy proceedings, we have carefully observed the respondent as he testified. We have also compared his trial testimony with several pre-trial declarations.

While the respondent seems to have exaggerated the importance of his activities during World War II and his recollection of the 1945 bicycle incident was inaccurate,

we nevertheless find, by and large, that his testimony was credible. The inconsistencies between the pre-trial declarations and the testimony were not significant and the respondent was generally able to explain these differences.

CONCLUSION

In reaching a decision, the court has considered all of the foregoing factors and has concluded that overall, the Government has not established its case by clear, unequivocal and convincing evidence as required in deportation proceedings.

Accordingly, the following order will be entered:

ORDERED: IT IS HEREBY ORDERED that the deportation proceedings be terminated.

/s/ _____
JOHN C. WILLIAMS
Immigration Judge

Appendix I

Constitutional Provisions and Statutes Involved

FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

No person shall be . . . deprived of life, liberty, or property, without due process of law;

* * * * *

IMMIGRATION AND NATIONALITY ACT SECTIONS 241(a)(1) and (a)(19), 8 U.S.C. § 1251(a)(1) AND 8 U.S.C. § 1251(a)(19)

CHAPTER 5—DEPORTATION; ADJUSTMENT OF STATUS

GENERAL CLASSES OF DEPORTABLE ALIENS

Sec. 241. [8 U.S.C. 1251] (a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—

(1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry;

* * *

(19) during the period beginning on March 23, 1933, and ending on May 8, 1945, under the direction of, or in association with—

(A) the Nazi government of Germany,

(B) any government in any area occupied by the military forces of the Nazi government of Germany,

(C) any government established with the assistance or cooperation of the Nazi government of Germany, or

(D) any government which was an ally of the Nazi government of Germany,

ordered, incited, assisted, or otherwise participated in the persecution of any person, because of race, religion, national origin, or political opinion.

* * * * *

Appendix I

Constitutional Provisions and Statutes Involved

IMMIGRATION AND NATIONALITY ACT SECTION 242(b), 8 U.S.C. § 1252(b)

APPREHENSION AND DEPORTATION OF ALIENS

Sec. 242. [8 U.S.C. 1252]

* * *

(b) A special inquiry officer shall conduct proceedings under this section to determine the deportability of any alien, and shall administer oaths, present and receive evidence, interrogate, examine, and cross-examine the alien or witnesses, and as authorized by the Attorney General, shall make determinations, including orders of deportation. Determination of deportability in any case shall be made only upon a record made in a proceeding before a special inquiry officer, at which the alien shall have reasonable opportunity to be present, unless by reason of the alien's mental incompetency it is impracticable for him to be present, in which case the Attorney General shall prescribe necessary and proper safeguards for the rights and privileges of such alien. If any alien has been given a reasonable opportunity to be present at a proceeding under this section, and without reasonable cause fails or refuses to attend or remain in attendance at such proceeding, the special inquiry officer may proceed to a determination in like manner as if the alien were present. In any case or class of cases in which the Attorney General believes that such procedure would be of aid in making a determination, he may require specifically or by regulation that an additional immigration officer shall be assigned to present the evidence on behalf of the United States and in such case such additional immigration officer shall have authority to present evidence, and to interrogate, examine and cross-examine the alien or other witnesses in the proceedings. Nothing in the preceding sentence shall be construed to diminish the authority conferred upon the special inquiry

officer conducting such proceedings. No special inquiry officer shall conduct a proceeding in any case under this section in which he shall have participated in investigative functions or in which he shall have participated (except as provided in this subsection) in prosecuting functions. Proceedings before a special inquiry officer acting under the provisions of this section shall be in accordance with such regulations, not inconsistent with this Act, as the Attorney General shall prescribe. Such regulations shall include requirements that—

(1) the alien shall be given notice, reasonable under all the circumstances, of the nature of the charges against him and of the time and place at which the proceedings will be held;

(2) the alien shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose;

(3) the alien shall have a reasonable opportunity to examine the evidence against him, to present evidence in his own behalf, and to cross-examine witnesses presented by the Government; and

(4) no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence.

The procedure so prescribed shall be the sole and exclusive procedure for determining the deportability of an alien under this section. In any case in which an alien is ordered deported from the United States under the provisions of this Act, or of any other law or treaty, the decision of the Attorney General shall be final. In the discretion of the Attorney General, and under such regulations as he may prescribe, deportation proceedings, including issuance of a warrant of arrest, and a finding of deportability under this section need not be required in the case of any alien who admits to belonging to a

class of aliens who are deportable under section 241 if such alien voluntarily departs from the United States at his own expense, or is removed at Government expense as hereinafter authorized, unless the Attorney General has reason to believe that such alien is deportable under paragraph (4), (5), (6) (7), (11), (12), (14), (15), (16), (17), or (18) of section 241(a). If any alien who is authorized to depart voluntarily under the preceding sentence is financially unable to depart at his own expense and the Attorney General deems his removal to be in the best interest of the United States, the expense of such removal may be paid from the appropriation for the enforcement of this Act.

* * * * *

Supreme Court, U.S.
FILED
MAY 23 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1483

In the Supreme Court of the United States

OCTOBER TERM, 1985

BOLESLAVS MAIKOVSKIS, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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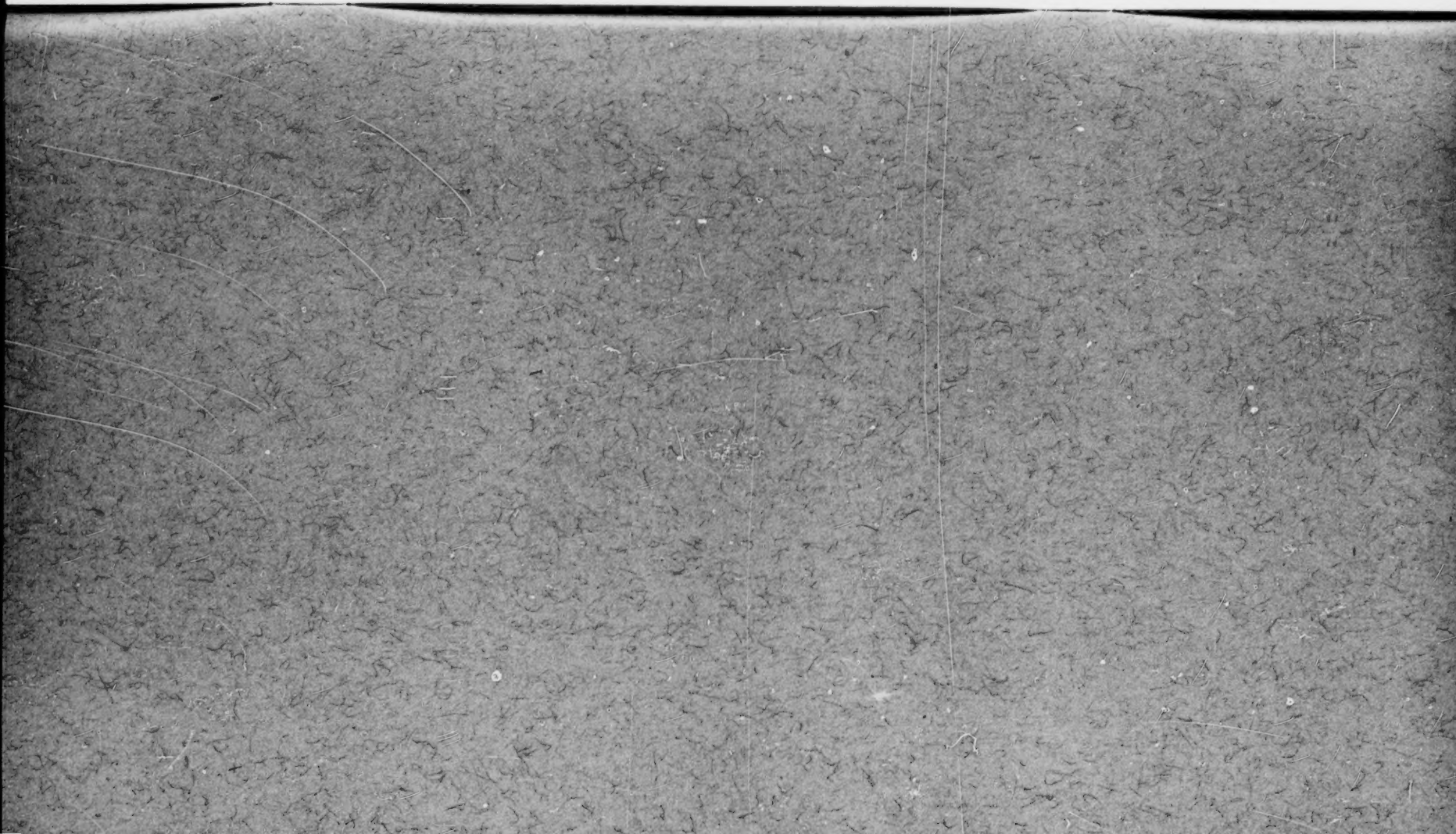

QUESTIONS PRESENTED

1. Whether misrepresentations made by petitioner when he obtained a visa to enter this country were sufficiently material to justify his deportation.

2. Whether petitioner's participation in the destruction of a Latvian village and the mass arrest of its inhabitants, many of whom were Communists, constituted "persecution * * * because of * * * political opinion" within the meaning of 8 U.S.C. 1251(a)(19).

3. Whether the Board of Immigration Appeals' adoption of a legal theory not urged by the government on appeal denied petitioner due process.

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-1483

BOLESLAVS MAIKOVSKIS, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-35a) is reported at 773 F.2d 435. The decision of the Board of Immigration Appeals (Pet. App. 37a-89a) is unreported. The decision of the immigration judge (Pet. App. 90a-111a) is also unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 17, 1985. A petition for rehearing was denied on November 12, 1985 (Pet. App. 36a). On January 16, 1986, Justice Marshall extended the time in which to file a petition for a writ of certiorari to and including March 10, 1986. The petition was filed on March 6, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The government brought this suit to deport petitioner on two distinct grounds: (1) that petitioner was excludable at the time of his entry because he made misrepresentations in connection with obtaining a visa (8 U.S.C. 1251(a)(1)); and (2) that petitioner engaged in acts of persecution because of political opinion while serving as a chief of police in Nazi-occupied Latvia (8 U.S.C. 1251(a)(19)). The immigration judge terminated the deportation proceedings, but the Board of Immigration Appeals reversed and ordered petitioner deported. The court of appeals affirmed.

1. The evidence showed that petitioner lived in Rezekne, Latvia, in July 1941 when Nazi forces invaded that area. The Nazis set up a local police unit under the SS command; petitioner volunteered and was appointed Chief of the Second Police Precinct. In that position, which he held for four years, petitioner ordered his Latvian unit to join German soldiers in taking action against the village of Audrini following the killing of two Latvian police officers in the village. All of the residents of Audrini were arrested, and the village was burned. Petitioner admitted that he participated in this atrocity and that he reported by memorandum the successful completion of the mission. Subsequently, the villagers were all murdered; petitioner denied that he participated in that event. Pet. App. 4a-5a.

Petitioner entered this country in 1951 with an immigrant visa issued pursuant to the Displaced Persons Act of 1948 (DP Act), ch. 647, 62 Stat. 1009 *et seq.*, amended by the Act of June 16, 1950, ch. 262, 64 Stat. 219 *et seq.* In his visa application, petitioner misrepresented the nature of his wartime service. Rather than disclosing that he was a police chief, petitioner stated that from December 1941 to October 1944 he had worked as a bookkeeper for the Latvian Railway Department in Riga, Latvia. Pet. App. 3a. The official

who had issued petitioner's visa under the DP Act testified that if petitioner had told the truth about his wartime activities, his police service would have rendered him ineligible under the DP Act, and she would have denied him a visa (*id.* at 5a).[1]

2. The immigration judge dismissed the deportation proceedings (Pet. App. 90a-112a). He found that petitioner had knowingly and intentionally failed to disclose his police activities in Rezekne during the relevant period, and further, that he had either participated or acquiesced in the arrest of peaceful civilian residents of Audrini, as well as the burning of their dwellings (*id.* at 108a, 112a). The immigration judge found, however, that petitioner's misrepresentation had not been shown to have cut off a line of inquiry that would have led to a determination that he was ineligible for a visa. The immigration judge therefore concluded that the misrepresentation was not sufficiently material to warrant petitioner's deportation under Section 241(a)(1) of the Immigration and Nationality Act, 8 U.S.C. 1251(a)(1) (Pet. App. 108a). The immigration judge also found that the Audrini incident did not justify deportation under Section 241(a)(19) of the Act, 8 U.S.C. 1251(a)(19), because it had not been shown that petitioner was motivated by racism in participating in the arrests and the burning of the village (Pet. App. 108a).

The Board of Immigration Appeals reversed (Pet. App. 37a-89a). The Board found that the arrests and the burning of the homes of all of the inhabitants of Audrini constituted persecution within the meaning of Section 241(a)(19). The Board rejected petitioner's claim that this persecution was

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[1]Petitioner attempted to rebut that testimony by introducing evidence that some Latvian policemen were admitted to this country. Even petitioner's evidence, however, made clear that anyone known to have served in the Latvian police force would have had his background fully investigated. Pet. App. 5a.

not based upon political motives, finding that "the actions carried out against the Audrini villagers were initiated because of the political opinions held by some of the inhabitants" (Pet. App. 67a). Therefore, the Board stated (*ibid.* (footnote omitted)): "[W]e have no difficulty in concluding that the persecution in which the respondent assisted was based on political opinion and comes within the meaning of section 241(a)(19)." The Board also found that petitioner's misrepresentations on his visa application were material, thereby rendering him deportable under Section 241(a)(1) (Pet. App. 67a-83a). The Board ordered petitioner deported to Switzerland (*id.* at 89a).

3. The court of appeals affirmed, upholding the Board's determination on both counts (Pet. App. 1a-35a). The court held that the materiality test announced by this Court in *Chaunt* v. *United States*, 364 U.S. 350 (1960), was applicable at the visa stage; it stated that under that test "the materiality of the misrepresentation is established where the government shows that disclosure of the concealed information probably would have led to the discovery of facts warranting the denial of a visa" (Pet. App. 13a). The court held that petitioner's misrepresentations in this case concerning his wartime activities "plainly" met this test (*ibid.*).

Because a finding of deportability under Section 241(a)(19) makes an alien ineligible to apply for discretionary relief, the court of appeals proceeded to consider petitioner's claim that his participation in the Audrini incident did not warrant deportation under that Section (see Pet. App. 14a). The court rejected the claim, holding that the destruction of Audrini was motivated in substantial part by the alleged Communist sympathies of its inhabitants and hence that petitioner had participated in persecution committed "because of * * * political opinion" (*id.* at 20a). The Board's findings, the court held, were based upon "reasonable, substantial and probative support" in the record

(*id.* at 25a). Judge Newman dissented from the court's affirmance on the Section 241(a)(19) count, urging that the case be remanded to the Board to consider whether the Audrini incident should be classed as persecution "because of * * * political opinion" in light of the fact that part of the motivation for the incident appeared to be a reprisal for the deaths of the two Latvian policemen (*id.* at 27a-35a).

ARGUMENT

1. Petitioner contends (Pet. 4-8) that the Court should grant certiorari to consider whether the court of appeals applied the wrong materiality test in determining whether his misrepresentation in obtaining his visa justifies his deportation. This contention is wholly without merit.

Petitioner first notes (Pet. 4-7) that this Court has not resolved the question of the precise materiality test to be applied to misrepresentations in visa applications. Be that as it may, this case presents no occasion for consideration of that issue. The court of appeals here, like other courts of appeals (see Pet. 6), decided to adopt the materiality test set forth in *Chaunt* v. *United States, supra*. That test applies in denaturalization proceedings, where the issue is the materiality of misrepresentations made in order to secure citizenship. Because it is well established that the government bears a "heavy burden" (*Fedorenko* v. *United States*, 449 U.S. 490, 505 (1981)) in seeking to divest a naturalized citizen of his citizenship, this materiality standard is a stringent one. The present case involves only the deportation of an alien, not the more serious step of the denaturalization of a citizen, which was at issue in *Chaunt*. If the materiality standard applicable to visa applications in deportation actions is to be a different one, it should be a lesser standard than in *Chaunt*, not a greater one.[2]

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[2]The burden of proof in deportation actions is the same as that in denaturalization actions: "clear * * * and convincing evidence." *Woodby* v. *INS*, 385 U.S. 276, 286 (1966).

Petitioner offers no basis whatsoever for suggesting that a stricter standard of materiality should apply here. There is therefore no way that petitioner could benefit from a ruling that the court of appeals erred in applying the *Chaunt* standard to misrepresentations made in the visa application process.[3]

Petitioner also briefly suggests (Pet. 7-8) that the Court should grant certiorari to resolve an alleged conflict in the courts of appeals regarding the correct interpretation of *Chaunt*. Whatever may be the merit of the assertion that there is a conflict, it is clear that this case presents no opportunity to address the question because the facts of this case compel a finding of materiality even under the most stringent view of the *Chaunt* test relied upon by petitioner. Both Justice Blackmun in his concurring opinion in *Fedorenko*, 449 U.S. at 523-526, and the Tenth Circuit in *United States* v. *Sheshtawy*, 714 F.2d 1038, 1040-1041 (1983), acknowledged that the *Chaunt* test is satisfied if the government demonstrates the "existence of disqualifying facts" (449 U.S. at 524; 714 F.2d at 1040) that were covered up by the misrepresentations in question. That standard is plainly satisfied here. Petitioner has admitted his involvement in the Audrini incident, and he does not and cannot dispute that his assistance to the Nazis in that act of persecution made him ineligible for entry into this country under the DP Act. See Pet. App. 13a, 43a, 81a.[4] Indeed, even

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[3]In fact, the statutory provision under which petitioner's misrepresentations rendered him excludable—and hence deportable—contain no explicit materiality requirement at all. Section 10 of the DP Act made excludable any person who "willfully ma[d]e a misrepresentation for the purpose of gaining admission into the United States." 62 Stat. 1013.

[4]Persons who "assisted the enemy in persecuting civil populations," regardless of motivation, were not eligible for admission under the DP Act because they were not refugees of concern to the International Refugee Organization. See Pet. App. 42a-43a.

petitioner's own formulation of the test—that the government must prove that "had the undisclosed facts been known, an investigation would have been conducted and disqualifying facts would have been discovered" (Pet. 8)—is satisfied here. Petitioner's own witnesses testified that even if petitioner's status as a Latvian police chief was not alone enough to disqualify him, it would have induced the authorities to have "his background fully investigated" (Pet. App. 5a). Thus, under any view of *Chaunt*, it is apparent that petitioner's misrepresentations concerning his wartime service, which covered up his disqualifying role in the Audrini incident, were material and therefore warrant his deportation under 8 U.S.C. 1251(a)(1).

2. Petitioner contends (Pet. 9-15) that the court of appeals erred in finding him deportable under Section 241(a)(19) because he lacked any personal motivation to persecute on the basis of political opinion when he participated in the Audrini incident. Petitioner's construction of Section 241(a)(19) is incorrect, and his assertion that the court of appeals' opinion on this point conflicts with decisions of other circuits is totally without foundation.

a. Petitioner asserts (Pet. 12) that his motivation for ordering the mass arrest of the inhabitants of Audrini and the total destruction of the village was "not only different from that of the Nazis, but was also completely legitimate." While petitioner does not dwell on the "legitimate" motivation for the Audrini atrocity, he contends that his conduct was not based on the political opinions of the villagers. Petitioner does not dispute that the court of appeals was correct in finding that the destruction of Audrini constituted political persecution by the Nazis. He argues instead that this political motivation cannot be ascribed to him, and that he is therefore not deportable under Section 241(a)(19).

As the court of appeals explained (Pet. App. 20a), the plain language of the statute refutes petitioner's contention.

Section 241(a)(19) covers persons who assisted, ordered, or participated in "the persecution of any person because of * * * political opinion." The statute asks whether the event in question was an act of persecution within the meaning of the statute and then whether the alien participated in that act of persecution. The statute plainly does not contemplate an inquiry into the individual alien's motive for assisting in persecution. This interpretation is further supported by the legislative history cited by the court of appeals, which emphasizes that the statute is directed at persons who assisted in governmental acts of persecution, not persons who took it upon themselves as individuals to commit acts of persecution (see Pet. App. 21a). Thus, petitioner's major role in the Audrini incident—an act of persecution directed by the Nazis at Communists because of their political beliefs—makes him deportable under Section 241(a)(19) regardless of whether he personally harbored any animus against Communists.[5]

Petitioner errs in asserting (Pet. 10) that the court's failure to examine his individual motives for participating in the Audrini incident placed it into conflict with *Laipenieks* v. *INS*, 750 F.2d 1427, 1435 (9th Cir. 1985). In *Laipenieks*, the court of appeals found that the alien was not deportable because there was insufficient evidence that he had participated or assisted in acts of persecution; that is, the court found that the evidence did not support the conclusion that "any individual apprehended by Laipenieks was eventually

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[5]Petitioner mischaracterizes the court of appeals' opinion when he asserts (Pet. 10-11) that the court has held that anyone who assisted the Nazis in any endeavor is subject to deportation under Section 241(a)(19) because the Nazis engaged in acts of persecution. The court held only that the Section applies to persons who assisted in a particular act of persecution that meets the statutory criteria; an alien who assisted the Nazis in some regard but did not participate or assist in the types of persecution specified in the statute would not be covered.

persecuted because of the person's political beliefs" (*id.* at 1437). The *Laipenieks* court therefore held that an alien could be deported under Section 241(a)(19) only if it was shown that the alien's acts "led to the persecution of individuals because of political belief" (750 F.2d at 1435). The Ninth Circuit never suggested that an alien who participated in acts of persecution ordered by the Nazis because of race, religion, or political opinion would be immune from deportation as long as the individual had a different motive for participating in the particular acts of persecution. Thus, the decision below is fully in accord with *Laipenieks*.

b. Petitioner contends (Pet. 15-16) that the court of appeals erred in finding that his conduct would be covered by Section 241(a)(19), even if the Audrini incident was motivated in part by the killing of the two Latvian policemen. The court of appeals concluded that Section 241(a)(19) was applicable as long as political opinion was the "principal motivating factor" for the incident (Pet. App. 26a). Petitioner provides no basis for the implicit contention that Section 241(a)(19) is inapplicable where there was a second motive for an act of persecution, no matter how dominant the primary motive of persecuting persons because of their race, religion, or political opinion. Once again, there is no reason to suppose that Congress would have intended that Section 241(a)(19) be given such a restrictive construction.[6]

Petitioner asserts that the decision below conflicts with *Laipenieks* because at one point in its opinion the Ninth Circuit stated that the government must prove that "individuals were persecuted solely because of their political opinion" (750 F.2d at 1437). This isolated statement plainly

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[6]Even the dissenting judge in the court of appeals explicitly rejected that construction of the statute; he stated that he "agree[d] with the majority that political opinion need be only a 'major motivation' for the persecution" (Pet. App. 31a).

does not reflect a holding by the Ninth Circuit that Section 241(a)(19) cannot apply where there is any additional motivation for a particular act of persecution. The Ninth Circuit was not faced with that situation. The court in *Laipenieks* found that there was "no evidence" that any of Laipenieks' victims had been persecuted because of his political opinion (750 F.2d at 1437); thus, the court found that political oppression was not a motive at all, much less a dominant one, for the persecution in question. In short, there is no basis whatsoever for supposing that the Ninth Circuit would not agree with both the majority and the dissent here that Section 241(a)(19) applies where political oppression or religious hatred is the dominant, albeit not exclusive, motive for an act of persecution.

3. Petitioner also contends (Pet. 16-20) that basing his deportation in part on the Audrini incident violates his due process rights because the government had disclaimed reliance on that incident subsequent to the close of the hearing before the immigration judge and did not rely on it in its brief before the Board. This factbound contention is without merit and does not warrant review by this Court.

As the court of appeals explained in detail (Pet. App. 14a-17a), the immigration judge made a request of the government, more than a year after the close of the evidentiary hearing, in which he asked it to clarify which factual allegations it was relying on to support deportation under Section 241(a)(19),which had been identified in the order to show cause as a separate charge of deportability. The government's response did not list the Audrini incident, although both parties in their post-hearing briefs had addressed the relevance of that incident to the Section 241(a)(19) charge. In its brief before the Board of Immigration Appeals, the government also did not rely on the Audrini incident. Nonetheless, the court of appeals correctly concluded (Pet. App. 17a-19a) that it did not violate

due process under the circumstances of this case for the Board to base petitioner's deportation in part on that incident.

Petitioner cites no authority to support his position that an appellate tribunal is constitutionally prohibited from relying on a ground advanced at trial but not pressed on appeal. As the dissenting judge acknowledged (Pet. App. 34a), petitioner from the outset had notice that the Audrini episode would be relied upon to support the Section 241(a)(19) charge. He was therefore aware that he should place in the record whatever evidence he had that was germane to that charge. Thus, petitioner was not prejudiced in any way in the factual presentation of his case by the government's post-trial statement. For that reason, this case is clearly distinguishable from the cases relied upon by petitioner (Pet. 19), in which the defendant was deprived of the opportunity either to prepare for trial or to present his case to the finder of fact. See, *e.g.*, *Dunn* v. *United States*, 442 U.S. 100, 106-107 (1979).

Nor was petitioner prejudiced in the appellate presentation of his case. While it may be true that petitioner would otherwise have addressed the Audrini incident directly in his brief before the Board, he did address it in his brief before the immigration judge. Thus, his position on this issue was fully aired when the Board took it under consideration. The Board considered the evidence and correctly concluded that the Audrini incident made petitioner deportable under Section 241(a)(19). That conclusion was concurred in by the court of appeals, which is the ultimate arbiter of this legal issue, and there is no dispute that petitioner had every opportunity to present his contention on this issue before that court. In sum, petitioner was in no way prejudiced by the government's failure to link the Audrini incident to the Section 241(a)(19) charge at the conference before the immigration judge held one year after the close of the evidence at the deportation hearing.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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